

**Bond University**

## **DOCTORAL THESIS**

### **The Doctrinal Coherence of the Torrens System of Land Registration in Australia: Evolution or Revolution?**

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*Award date:*  
2017

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**The Doctrinal Coherence of the Torrens System of Land Registration in  
Australia: Evolution or Revolution?**

**Lynden Griggs**

**PhD by Published Work**

**Bond University, October 2016**

**Faculty of Law, Bond University**



## **Abstract**

This submission demonstrates the original contribution made by my published work in advancing knowledge and understanding in the field of land law and specifically the Torrens system of land registration (or more generally title by registration). My body of work references a series of integrated and interrelated research questions all of which go towards answering the following: To what extent have the judicial and legislative developments concerning title by registration achieved doctrinal coherence with the ideas that underlie a title by registration (or Torrens) system of land registration? Within this overarching question, the taxonomy of my work is structured as follows: doctrinal research into indefeasibility and the recognition of unregistered interests in the Torrens system, the relationship between possession and title by registration, and discourse on the application of economic theory and consumer law to title by registration. The overarching view I reach is that the Torrens system of land registration and the institutions that guard its principles (be it the Parliament, judiciary, academe, conveyancing agents, financial institutions, and electronic conveyancing regulators (Australian Registrars National Electronic Conveyancing Council and Property Exchange Australia)) must remain vigilant in ensuring that the Torrens system of land registration is not modified in such a way that its doctrinal coherence is undermined.

This thesis is submitted to Bond University in fulfilment of the requirements for the degree of Doctor of Philosophy by Published Work. This thesis represents my own original work towards this research degree and contains no material that has previously been submitted for a degree or diploma at this University or any other institution, except where due acknowledgement is made.

**Signature of Lynden Griggs (October, 2016)**

## **Acknowledgments**

First, acknowledgement must be given to Bond University for providing the opportunity to undertake a PhD by Published Work. While many universities offer this option to staff of their own institution, and some provide the opportunity on a fee paying basis to people outside the institution, Bond University displayed the foresight and innovation to introduce this as an option for late career academics who need an AQF Level 10 qualification — while understanding that the instrument to do this had to be different in shape and form to the traditional PhD.

Second, I have a deep appreciation to my supervisors, Professor Michael Weir, and Assistant Professor Francina Cantatore. Their guidance, insight, and encouragement were invaluable.

Third, thanks must also be expressed to the Confirmation Committee whose feedback and advice immeasurably improved the final product.

Finally, this research was supported by an Australian Government Research Training Program Scholarship.

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- Lynden Griggs, 'The common law abandonment of easements on Torrens Land – can it be done, and, if so, should the intent of predecessors in title be taken into account' (2007) 14 *Australian Property Law Journal* 162.
- Lynden Griggs, 'Case Note: In Personam: *Barnes v Addy* and the High Court's Deliberations in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*' (2008) 15 *Australian Property Law Journal* 268.
- Lynden Griggs, 'Case Note: To and From, but Not Across – the High Court on Easements, Torrens, and Doctrinal Purity' (2008) 15 *Australian Property Law Journal* 260.
- Lynden Griggs, 'Resolving the Debate Surrounding Indefeasibility through the Eyes of a Consumer' (2009) 17 *Australian Property Law Journal* 260.

- Rouhshi Low and Lynden Griggs, 'Immediate Indefeasibility – is it Under Threat' (2011) 19 *Australian Property Law Journal* 222.
- Rouhshi Low and Lynden Griggs, 'Going through the obstruction, the Torrens System Assurance Fund and contemporary solutions – a tale weaved from a story of a nun, a romantic triangle and sibling corruption' (2014) 23 *Australian Property Law Journal* 17.
- Lynden Griggs, 'Debunking negligence's role in imposing a duty on the servient owner of an easement towards the dominant owner' (2015) 23 *Australian Property Law Journal* 183.

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- Lynden Griggs, 'The Assurance Fund: Government Funded or Private?' (2002) 76 *Australian Law Journal* 250.

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- Rouhshi Low and Lynden Griggs, 'Identity Fraud and Land Registration Systems: An Australian Perspective' (2011) 75 *The Conveyancer and Property Lawyer* 285.
- Lynden Griggs and Rouhshi Low, 'Identity Verification in Conveyancing: The Failure of Current Legislation and Regulatory Measures, and Recommendations for Change' (2012) 76 *The Conveyancer and Property Lawyer* 363.



## Statement of Co-Authorship

The following articles were co-written with Dr Rouhshi Low of the Queensland University of Technology. In these articles, my contribution was greater than 50% in that I was responsible for the initiation, key planning, execution, preparation, and responding to referee queries. It would be remiss not to acknowledge the exceptional work of Dr Low. A signed acknowledgement by Dr Low of my primary author status is noted below.

1. L Griggs and R Low, 'Identity Fraud and Land Registration Systems: An Australian Perspective' (2011) 75 *The Conveyancer and Property Lawyer* 285.
2. R Low and L Griggs, 'Immediate Indefeasibility – is it Under Threat' (2011) 19 *Australian Property Law Journal* 222.
3. R Low and L Griggs, 'Identity Verification in Conveyancing: The Failure of Current Legislation and Regulatory Measures, and Recommendations for Change' (2012) 76 *The Conveyancer and Property Lawyer* 363.
4. L Griggs and R Low, 'Going through the obstruction, the Torrens System Assurance Fund and contemporary solutions – a tale weaved from a story of a nun, a romantic triangle and sibling corruption' (2014) 23 *Australian Property Law Journal* 17.

Signature of Dr Rouhshi Low

Date: 12/11/15

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**Chronological List of Publications – for PhD by Published Work – Bond  
University**

**Theme – Doctrinal Coherence of the Torrens System**

**Refereed/Research Publications as Primary Author**

1. Lynden Griggs, 'Torrens Title – Arise the Registered and Unregistered, Befall the Legal and Equitable' (1997-1998) *Deakin Law Review* 35 (7250 words).
2. Lynden Griggs, 'Possessory Titles in a System of Title by Registration' (1999) 21 *Adelaide Law Review* 157 (8600 words).
3. Lynden Griggs, 'Torrens Title in a Digital World' (2001) 8 *Murdoch University Electronic Journal of Law* (8052 words).
4. Lynden Griggs, 'In Personam, *Garcia v NAB* and the Torrens System – Are they Reconcilable' (2001) 1(1) *Queensland University of Technology Law Journal* 76 (6854 words).
5. Lynden Griggs, 'The Assurance Fund: Government Funded or Private' (2002) 76 *Australian Law Journal* 250 (5062 words).
6. Lynden Griggs, 'Case Note: The Tectonic Plate of Equity: Establishing a Fault Line in our Torrens Landscape' (2003) 10 *Australian Property Law Journal* 78 (2842 words).
7. Lynden Griggs, 'Indefeasibility and Mistake – the Utilitarianism of Torrens' (2003) 10 *Australian Property Law Journal* 108 (7628 words).
8. Lynden Griggs, 'Case Note: *Hillpalm Pty Ltd v Heavens Door Pty Ltd*' (2005) 11 *Australian Property Law Journal* 244 (4314 words).
9. Lynden Griggs, 'The common law abandonment of easements on Torrens Land – can it be done, and, if so, should the intent of predecessors in title be taken into account' (2007) 14 *Australian Property Law Journal* 162 (10879 words).
10. Lynden Griggs, 'Possession, Indefeasibility and Human Rights' (2008) 8 *Queensland University of Technology Law Journal* 286 (9086 words).

11. Lynden Griggs, 'Case Note: In Personam: *Barnes v Addy* and the High Court's Deliberations in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*' (2008) 15 *Australian Property Law Journal* 268 (4666 words).
12. Lynden Griggs, 'Case Note: To and From, but Not Across – the High Court on Easements, Torrens, and Doctrinal Purity' (2008) 15 *Australian Property Law Journal* 260 (4332 words).
13. Lynden Griggs, 'Resolving the Debate Surrounding Indefeasibility through the Eyes of a Consumer' (2009) 17 *Australian Property Law Journal* 260 (11779 words).
14. Lynden Griggs, 'Curial Discretion in the Drafting of Caveats – Is it Preserving the Integrity of the Register' (2009) 21(2) *Bond Law Review* 68 (8575 words).
15. Lynden Griggs and Rouhshi Low, 'Identity Fraud and Land Registration Systems: An Australian Perspective' (2011) 75 *The Conveyancer and Property Lawyer* 285 (12852 words).
16. Rouhshi Low and Lynden Griggs, 'Immediate Indefeasibility – is it Under Threat?' (2011) 19 *Australian Property Law Journal* 222 (5014 words).
17. Rouhshi Low and Lynden Griggs, 'Identity Verification in Conveyancing: The Failure of Current Legislation and Regulatory Measures, and Recommendations for Change' (2012) 76 *The Conveyancer and Property Lawyer* 363 (8716 words).
18. Rouhshi Low and Lynden Griggs, 'Going through the obstruction, the Torrens System Assurance Fund and contemporary solutions – a tale weaved from a story of a nun, a romantic triangle and sibling corruption' (2014) 23 *Australian Property Law Journal* 17 (9305 words).
19. Lynden Griggs, 'Debunking negligence's role in imposing a duty on the servient owner of an easement towards the dominant owner' (2015) 23 *Australian Property Law Journal* 183 (6811 words).
20. Lynden Griggs, 'Indefeasibility and Boundaries – Developing the Ultimate Cadastre' (2016) 5 *Property Law Review* (9171 words).

## **Other Original Research**

1. Rohan Price and Lynden Griggs, *Property Law in Principle*, (Thomson Reuters, 2 editions, 2005 and 2008), specifically note Chapters 6 'The Torrens System: the Principle of Indefeasibility', and Chapter 7 'Priorities', solely responsible for both.
2. Lynden Griggs, *Law of Easements in Tasmania: Issues Paper*, Tasmania Law Reform Institute, 13 (2009) (Issues Paper prepared with the research assistance of Kirsten Muskett). Final Report published subsequent to release of Issues Paper (Newitt and Griggs, *Law of Easements in Tasmania: Final Report*, Tasmanian Law Reform Institute, Hobart, Tasmania, 12 (2010)).

## **Other Refereed Contributions (authorship shared equally):**

1. R Thomas, R Low and L Griggs, 'Australasian Torrens Automation: Its Integrity and the 3 Proof Requirements' (2013) 2 *New Zealand Law Review* 227 (9513 words) (33% contribution).
2. R Thomas, L Griggs and R Low, 'Electronic Conveyancing in Australia – is anyone concerned about security' (2014) 23 *Australian Property Law Journal* 1 (7935 words) (33% contribution).
3. L Griggs, R Low and R Thomas, 'Accounting for Risk, the Advent of Capped Conveyancing Insurance' (2015) 24 *Australian Property Law Journal* 1(6648 words) (33% contribution).

## **Other Contributions – Texts**

- Lynden Griggs, Eugene Clark and Ian Iredale, *Managers and the Law: A Guide for Business Decision Makers* (Thomson Reuters, 3 editions, 1999, 2003 and 2009) – specifically note Chapter 7, *Maintaining and Enhancing Property Rights*, Co-written with Anne Fitzgerald (50% contribution).
- Anthony Moore, Scott Grattan and Lynden Griggs, *Bradbrook, MacCallum and Moore's Australian Real Property Law* (Thomson Reuters, 6<sup>th</sup> ed, 2016) – responsible for Chapter 1 (Concepts of Property); Chapter 4 (The Torrens System: The Principle of Indefeasibility); Chapter 5 (Priorities); Chapter 6



(Public Land and Indigenous Peoples) (also responsible for corresponding chapters in accompanying *Australian Property Law: Cases and Materials* (5<sup>th</sup> ed, 2016).

# Chapter 1: The Interrelated Research Questions and Research Methodology

## 1.1 Introduction

There can be no doubting the value and importance of land to society. It can be a scarce commodity as well as a source of wealth and power. More prosaically, it is the physical connection that each of us has with the planet.

Land is elemental: it is where life begins and it is where life ends. Land provides the physical substratum for all human activity; it is the essential base of all social and commercial interaction. We spend scarcely a moment out of contact with terra firma and our very existence is constantly sustained and shaped by the natural and constructed world around us.<sup>1</sup>

Critical to the full realisation of the value of land is certainty around land ownership or title to land. If ownership is uncertain, economic growth will be hindered. Land law and enforceability of land title are the fulcra on which much of our wealth as a nation is built<sup>2</sup> and, as such, they have a critical role in the reduction of poverty.<sup>3</sup> If the market for land ownership evidences doctrinal uncertainty, damage will be done to the economy and we will see a fracturing of neighbourly relations and the creation of community discord. Uncertainty will increase risk in the transaction process, decrease investor confidence in the property market, and reduce funding from the mortgagee sector for property investment. Community expectations will not be met if title to land

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<sup>1</sup> Kevin Gray and Susan Gray, *Elements of Land Law* (Oxford University Press, 2005) 1.

<sup>2</sup> Land, (and in this context I exclude the fixtures on the land), is worth 34% of the assets on the balance sheet of Australia. If you include the fixtures on land, then this adds another 33% on the balance sheet (18% offices, factories and associated infrastructure; 15% residential dwellings): see Philip Lowe (Deputy Governor, RBA), 'National Wealth, Land Values and Monetary Policy' (Paper presented at the 54<sup>th</sup> Shann Memorial Lecture, Perth, 12 August 2015) 1, 3.

<sup>3</sup> For a discussion of the importance of property titles as a measure to address poverty, see Sebastian Galiani and Ernesto Schargrodsky, 'Property Rights for the Poor: Effects of Land Titling' (Ronald Coase Institute, Working Paper Series, No 7 Revised). Their introduction states the following:

'The fragility of property rights is considered a crucial obstacle for economic development. The main argument is that individuals underinvest if others can seize the fruits of their investments. In today's developing world, a pervasive manifestation of feeble property rights are the millions of people living in urban dwellings without possessing formal titles of the plots of land they occupy. The absence of formal property rights constitutes a severe limitation for the poor. In addition to its investment effects, the lack of formal titles impedes the use of land as collateral to access the credit markets. It also affects the transferability of the parcels, making investments in untitled parcels highly illiquid. Moreover, the absence of formal titles deprives poor families of the possibility of having a valuable insurance and savings tool that could provide protection during bad times and retirement, forcing them instead to rely on extended family members and offspring as insurance mechanisms': at 1 (citations omitted).

is uncertain, easily removed, or undermined by the conveyancing process, legislative development, or case law interpretation.

In establishing title to land, two systems dominate world thinking. First, there are negative systems whereby the registration of a void instrument is ineffective to pass a valid interest. These systems operate merely to record ownership; registration does not overcome the lack of validity created by the void disposition. Second, there are positive systems that not only register title, but the act of registration creates and validates title.<sup>4</sup> These title by registration systems, often described in Australia as the Torrens system of land registration, elevate the act of registration as the means by which title is granted. The Torrens system of land registration will cure the defects that would otherwise be embedded in the title. The title granted by registration will not be affected by past omissions or errors in the conveyancing process, though as always with the law, this broad principle will be subject to some exceptions.<sup>5</sup> This simplicity is both its strength and its weakness. By this statutory fiat of title validation, it instantly obliterates the mistakes of the past, rendering them mere historical anomalies. But by so doing, it renders the new, now registered title, inherently vulnerable to defeat by subsequent actions resulting in registration.

The vision of Sir Robert Torrens, the architect of title by registration was to introduce a land registration system that would remove any need to consider past inaccuracies in the conveyancing process, and to ensure that the business of transacting for land could be done with simplicity, with ease, with convenience, and that it would be fit for purpose. As Sir Robert Torrens noted in his monograph of the time, 'The English Law of Property is admitted to be insecure, costly, cumbrous, tardy, injurious, and unsuited to the requirements of the inhabitants of these colonies.'<sup>6</sup> His work sought to overcome these problems.

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<sup>4</sup> As O'Connor notes, it was the work of SR Simpson who adopted the positive and negative distinction as outlined here. See Pamela O'Connor, 'Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Title Systems' (2009) 13(2) *Edinburgh Law Review* 194, 194-195 where she cites SR Simpson, *Land Law and Registration*, (Cambridge 1976), 15-16 who himself adopted the language from PE Norman, *Photogrammetry and the Cadastral Study*, (Netherlands, 1965), 8-10. As O'Connor notes at 195, the terms do not necessarily mean the same thing to every author. In most situations, a positive land registration system can be seen as a guarantee of title, but it can also be used in a more narrow sense to mean the conferral of title, with this title subject to overriding interests, or a right of rectification.

<sup>5</sup> See Charisse Griffith-Charles, *The Impact of the Land Titling on Land Transaction Activity and Registration System Sustainability: A Case Study of St Lucia* (unpublished PhD, University of Florida, 2004) 2 (copy held with author).

<sup>6</sup> Robert R Torrens, *The South Australian System of Conveyancing by Registration of Title* (Adelaide, 1859) 42.

Title by registration encompasses three elements<sup>7</sup> that serve to give it coherence. First, there is a public register that records the interests and rights, such as fee simple ownership, the existence of easements and covenants,<sup>8</sup> the rights of mortgagees, and certain leasehold interests. Entry onto the register establishes title. Unregistered interests remain enforceable though they are liable to be defeated by registered interests or in priority disputes with other unregistered interests. This is the first element — the importance of the register and the removal of dependent titles.<sup>9</sup> Visually expressed, the curtain<sup>10</sup> need not be drawn back. The second element is that an interested party is able to rely on the register. The register operates as a mirror, (or a photo), identifying and reflecting back to the onlooker the major interests in land that attach to the specific parcel within the cadastre.<sup>11</sup> The final element is that there will be compensation for those who suffer loss because of the register — the assurance fund. What title by registration does is create a positive incentive to register, provide a publically accessible register for all to access, and renders the unregistered interest as

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<sup>7</sup> See generally Murray Raff, 'Torrens, Hübbe, Stewardship and the Globalisation of Property Law Systems' (2009) 30 *Adelaide Law Review* 245-248. The architect of these three principles was Theodore Ruoff, who explored these ideas in *An Englishman looks at the Torrens System: being some provocative Essays on the operation of the System after one hundred years*, (LawBook Co., 1957). He had earlier identified these elements in 'An Englishman looks at the Torrens System Part I: The Mirror Principle' (1952) 26 *Australian Law Journal* 118; 'An Englishman looks at the Torrens System Part II: The Simplicity and the Curtain Principle' (1952) 26 *ALJ* 162.

<sup>8</sup> Though it should be noted that position concerning covenants differs from jurisdiction to jurisdiction. For example, in Tasmania, restrictive covenants are noted on title, but still depend on the governing equitable rules for their enforceability (see ss 102-104A *Land Titles Act* 1980). A similar position applies in New South Wales, Victoria and Western Australia. See Anthony P Moore, Scott Grattan and Lynden Griggs, *Bradbrook, MacCallum and Moore's Australian Real Property Law* (Thomson Reuters, 2016) [18.125]. In the remaining jurisdictions of Queensland, South Australia, the Australian Capital Territory and the Northern Territory, it appears as though there is no express power to note restrictive covenants on title.

<sup>9</sup> As noted by Stein, '[s]urrender of the certificate is, dogmatically, a renunciation of the estate which reverts to the Crown. After the examination of the documents the registrar writes out a new certificate for the purchaser and notes the transfer of rights in the book. This typical feudal law construction of renunciation and regrant is what Torrens adopted from the Middle Ages English Charter Rolls and Copyhold book system. Additionally, it is believed that the Deed books of the Hanse towns of Hamburg, Lübeck and Bremen contributed part of the model': see Robert Stein, 'The Principles, Aims and Hopes of Title by Registration' (1983) 2 *Adelaide Law Review* 267, 273-274, quoting von Metzler, *Das Anglo-Smerikanische Grundbuchwesen* (Cram, de Gruyter & co, Hamburg, 1966) 50 (trans).

<sup>10</sup> Ruoff described this curtain principle in the following way: '[The] curtain principle simplifies the duties of a donee or his legal adviser by shutting out forbidden things from his view' Theodore Ruoff, 'An Englishman looks at the Torrens System Part II: The Simplicity and the Curtain Principle' (1952) 26 *ALJ* 162, 164.

<sup>11</sup> It should be acknowledged that the mirror is not perfect and does not reflect statutory encumbrances such as environmental provisions, land tax, and heritage laws as exceptions to the paramountcy of the register. See for example Pamela O'Connor, Sharon Christensen and William Duncan, 'Legislating for Sustainability: A Framework for Managing Statutory Rights, Obligations and Restrictions affecting Private Land' (2009) 35(2) *Monash University Law Review* 233, 242-244, where the authors note that the number of rights, restrictions and obligations potentially affecting private land could be in the 100's. What is difficult to determine is whether those rights operate *in rem* or only *in personam*.

something of lesser weight.<sup>12</sup> Title by registration eliminates the rust of antiquity<sup>13</sup> and with each transaction involving the issue of a new title from the Crown; the system guarantees the validity of the transaction and the title that is held by the registered owner.<sup>14</sup> Once registered, however, the title held by the proprietor is, in a sense, determinable by the fraudulent actions of another. Accordingly it is undeniable that title by registration inherently and necessarily includes a sliver of risk — the sliver is that title can be defeated by a transaction (which as noted may be fraudulent), but which once registered in the name of an innocent party gains not just priority, but sees the elimination of the historical title of the previous registered proprietor. The person defrauded is left to seek financial compensation.

In Australia, through the prism of immediate indefeasibility,<sup>15</sup> we favour transactional or dynamic certainty over the static certainty of ownership.<sup>16</sup> Doctrinal coherence<sup>17</sup> within title by registration can undoubtedly lead, on occasions, to outcomes that are unfair. But this unfairness is no greater, and arguably considerably less than what can occur under general law. In responding to this perceived unfairness, the narrative that

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<sup>12</sup> See the comments by Simon Cooper, 'Resolving Title Conflicts in Registered Land' (2015) 131 *Law Quarterly Review* 108, 108.

<sup>13</sup> Though it should be noted that limitation statutes operate to prevent old or stale claims being asserted. The relevant statutes in each Australian state are as follows: *Limitations Act 1969* (NSW); *Limitation of Actions Act 1958* (Vic); *Limitation of Actions Act 1974* (Qld); *Limitation of Actions Act 1936* (SA); *Limitation Act 2005* (WA); *Limitation Act 1974* (Tas). Title to land cannot be lost to adverse possession in the Northern Territory (*Land Title Act* (NT), s 198) and the Australian Capital Territory (*Land Titles Act 1925* (ACT), s 69).

<sup>14</sup> As noted in *Gibbs v Messer* [1891] AC 248, 254: 'The main object of the [Torrens Act], and the legislative scheme for the attainment of that object, appears to [their Lordships] to be equally plain. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases, in bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title.'

<sup>15</sup> Immediate indefeasibility recognises that a purchaser of land obtains a title subject only to such estates and interests as are noted on the register. Deferred indefeasibility grants indefeasibility but only where the transaction is between two parties innocent of wrongdoing. For example, a transfer from a person stealing the identity of the registered proprietor to an innocent purchaser gives an immediately indefeasible title. Deferred indefeasibility would defer the grant of indefeasibility to a purchaser from the person who received title from the wrongdoer. Immediate indefeasibility is adopted in Australia: *Breskvar v Wall* (1971) 126 CLR 376 (*Breskvar*).

<sup>16</sup> Pamela O'Connor, 'Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Title Systems' (2009) 13(2) *Edinburgh Law Review* 194, 195. Static security refers to the security of ownership, and the principle that without consent the law will prevent a deprivation of property. Dynamic security or security of transaction references the position where the law will give effect to a transfer to a person who has acted in good faith. See the work of O'Connor at 198. See also Anne C. Pickering, 'New and Early Title Registration Jurisdictions — Lessons from Established Torrens Jurisdictions and other Essential Considerations' (2011) *LawAsia Journal* 111, 114.

<sup>17</sup> Coherence within the law is a topic of modern consideration within the High Court. As noted, in a broader context of the discussion around common law and statute and the musings by the High Court on this issue: Sir Anthony Mason states: 'It follows that the concept of doctrine of coherence applies both to analogical development of the common law from statute and to analogical development from the common law itself': Sir Anthony Mason, 'The Interaction of statute law and common law' (2016) 90 *Australian Law Journal* 324, 337.

surrounds land administration must seek solutions that advantage the collective goals of the Torrens system while seeking to ameliorate the harm occasioned on the individual owner.<sup>18</sup> With the relationship between the owner, the community, and land ever changing (with increasing individual responsibilities through local council edicts, bushfire awareness obligations, environmental and planning concerns, fauna and flora protection, heritage issues, and indigenous claims), title by registration must support, promote, and enhance land ownership in a way that meets broad community expectations while minimising individual injustice.

Title by registration, one of the world's great 'multi-disciplinary and multi-lingual law'<sup>19</sup> reform projects, was designed and built for an emerging nation-state, with large tracts of undeveloped land and an urgent need for funding to finance the development of public infrastructure.<sup>20</sup> Today, with the nation-state emerged and the Australian federation now a developed and wealthy economy, the need for a system of land registration that serves to secure land ownership as a means to fund public infrastructure no longer remains. Despite this, the maturity of Australia's title by registration scheme will see it remain as the preferred method for the property aspects of the cadastre. Nevertheless, this maturity will not remove the need to obtain a nuanced understanding of its operation and to continue to ask how it will evolve to meet new trends and new technologies.<sup>21</sup>

It is suggested that title by registration is superior to other forms of land registration (most notably recording systems) and that despite the occasional individual injustice, the system is efficient, largely meets community expectations, and is sustainable as paper based conveyancing is left behind in the wake of electronic or e-conveyancing. Indeed, it is argued that if the appropriate measures are put in place as we progressively engage with electronic conveyancing,<sup>22</sup> the same concerns that led Sir

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<sup>18</sup> An example of this can be seen in *Pedulla v Panetta* (2011) 16 BPR 30, 229 where an elderly woman who went into cloisters in Italy lost her Sydney residence through the actions of her brother and his partner, both of whom fled the country with the ill-gotten proceeds of their actions. Pedulla was compensated financially, but never recovered the property.

<sup>19</sup> Raff, above n 7, 245.

<sup>20</sup> For a discussion of the Wakefield method of systematic colonisation, see: <<http://boundforsouthaustralia.com.au/journey-content/edward-gibbon-wakefield.html>>.

<sup>21</sup> For example, one topic of interest today, specifically in developing economies, is the use of the blockchain technology to improve the accuracy of land registers: see Abishek Dobhal, Mathew Regan, 'Immutability and Auditability: The Critical Elements in Property Rights Registries' (Paper presented at the 2016 World Bank Conference on Land and Poverty, Washington DC, 14-18 March 2016).

<sup>22</sup> New South Wales is the lead jurisdiction on this: see *Electronic Conveyancing (Adoption of National Law) Act 2012*. All other states and territories will enact, or have enacted complementary legislation.

Robert Torrens to act<sup>23</sup> can be met without giving way to the ideas and principles that support title by registration. It is concluded that e-conveyancing, provided the right decisions around security are made, can, in fact, reinforce and further evolve the substantive law of title by registration to meet the aims of Sir Robert Torrens.

The remainder of this chapter highlights this theme by focusing on the aims or goals of a land administration system, with this followed by an outline of the research methodology adopted in my work. The following chapter will then connect my publications over the last 18 years to this idea and the research methodology adopted. The final chapter will speak to the contemporary relevance of my work and its sustaining contribution to the literature on title by registration. Ultimately, the research question identified is whether doctrinal coherence has been achieved as legislation and case law continues its interpretation of title by registration. More specifically, I ask what will be, or should be, the continued role of non-registered interests in a Torrens system of land registration, the ongoing relevance of possessory interests, and how electronic conveyancing will change the security concerns and potentially the substantive law associated with this form of land administration.

## 1.2 The Goals of a Land Administration System

The traditional goal of a land administration system is to support the operation of land transfer, and through this, the economic development and growth of a nation.<sup>24</sup> From the time of feoffment and livery of seisin, to registration of deeds, and now title by registration, the aim has always been to ensure that land can be transferred securely and with minimum transaction costs. These transaction costs can be identified as:

- i) information costs — the costs of finding the real estate that meets your needs, and ensuring its title;
- ii) bargaining costs associated with the contract; and

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<sup>23</sup> These concerns were the 'complexity' of the law, the 'heavy costs' associated with conveyancing, the embedded 'losses and much perplexity', that it was 'unsuited to requirements of a progressive community' and the 'value of land as a basis of credit was diminished': Torrens, above n 6, 8.

<sup>24</sup> See the comments by Daniel Steudler, 'A Framework for the Evaluation of Land Administration Systems' (unpublished PhD thesis, University of Melbourne, 2004) 1 (copy held with author).

- iii) the policing and enforcement costs associated with protecting the property from any adverse claims by a third party.<sup>25</sup>

What any party seeks to do is reduce the transaction costs associated with conveyancing (an efficiency mantra), while still ensuring that one gets what one anticipated (ie meeting the party's expectations). The system, be it recording or registration based, that best meets these endeavours, at the least cost collectively and individually, should be supported, and my clear and consistent view is that this system is title by registration.<sup>26</sup> Title by registration will minimise the policing and enforcement costs, with this able to be achieved without undermining doctrinal coherence.

Williamson suggests that doctrinal coherence requires that land registration systems achieve three goals:

- i) security of tenure for the landholders;
- ii) the recognition of the significant land rights that affect the majority of the population; and
- iii) to obtain and retain public trust in the system.<sup>27</sup>

In achieving these goals there must be a connection between the legal principles formulated by the legislature or the judiciary, and the previously mentioned ideas of the mirror, curtain, and indemnity. If these goals are not met, the system is in crisis.<sup>28</sup> Our understanding of doctrinal coherence in terms of land registration systems must be tempered by the realisation that the community must be comfortable with the substantive legal outcomes delivered by the system. In reinforcing the importance of indefeasibility in meeting doctrinal coherence, ideas must be developed as to how individual notions of justice can be accommodated in what I have described as Australia's 'best export'.<sup>29</sup> This involves an examination of the key principles that

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<sup>25</sup> Luis J Arrieta-Sevilla, 'A Comparative approach to the Torrens System' (2012) 20 *Australian Property Law Journal* 203, 204-205.

<sup>26</sup> Eg, Joseph T Janczyk, 'An Economic Analysis of the Land Title Systems for Transferring Real Property' (1977) *Journal of Legal Studies* 2; L Griggs, 'Torrens Title in a Digital World' [2001] *Murdoch University Electronic Journal of Law* 20.

<sup>27</sup> Ian P Williamson, 'Best Practices for Land Administration Systems in Developing Countries' (Paper presented at the International Conference on Land Policy Reform, Jakarta, 25-27 July 2000) 15.

<sup>28</sup> Ibid. Along similar lines, the United Nations Economic Commission for Europe has commented, 'the function of land registration is to provide a safe and certain foundation for the acquisition, enjoyment and disposal of rights in land': United Nations Economic Commission for Europe, *Land Administration Guidelines with Special Reference to Countries in Transition* (United Nations Publications, 1998) 11.

<sup>29</sup> Lynden Griggs, 'The Assurance Fund: Government Funded or Private' (2002) 76 *Australian Law Journal* 250, 257.



underlie Torrens,<sup>30</sup> with the most important of these being indefeasibility, with the principles of the mirror, curtain, and indemnity, inexorably linked to this.

### 1.3 Recording and Registration based Land Systems

As previously noted, two land registration systems guide global thinking. Recording based systems, such as that which exists in much of the United States of America (US), France, the Netherlands, and Italy, register the deeds associated with land ownership, with this providing a public record of ownership or a registration of title.<sup>31</sup> The risk associated with the transaction that led to ownership, or the underlying ownership itself is protected through measures such as title insurance.<sup>32</sup> Title by registration jurisdictions (specifically Torrens jurisdictions) include Malaysia, Singapore, Fiji, Papua New Guinea, pockets within a small number of US states (Minnesota, Massachusetts, Colorado, Georgia, Hawaii, Ohio, Washington, North Carolina), Kenya, Uganda, South Africa, Ivory Coast, Congo, Tunisia, Madagascar, the Philippines, Dominican Republic, Ireland, Thailand, Iran, Australia, New Zealand, Trinidad-Tobago, Jamaica, Belize, Syria and Canada.<sup>33</sup> In these jurisdictions:

[The] title of the new registered proprietor is cleared of any errors, mistakes or hidden defects, the process of registration acting, if you like, as a publicly funded hospital that remedies the injuries embedded within that title - a purge of past omissions or incorrect additions occurring by fiat of registration.<sup>34</sup>

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<sup>30</sup> Sharon Christensen, and William Duncan, 'Aligning Sustainability and the Torrens Register: Challenges and Recommendations for Reform' (2012) 20(2) *Australian Property Law Journal* 112.

<sup>31</sup> See generally Arrieta-Sevilla, above n 25.

<sup>32</sup> For a discussion of title insurance see Lynden Griggs and Rouhshi Low, 'Going through the Obstruction, the Torrens System Assurance Fund and Contemporary Solutions – a tale weaved from a story of a nun, a romantic triangle and sibling corruption' (2014) 23 *Australian Property Law Journal* 17.

<sup>33</sup> See the discussion by Greg Taylor, *The Law of the Land – the Advent of the Torrens System in Canada* (University of Toronto Press, 2008) 19, regarding the spread of Torrens. However, it is important to note that the extent of adoption does differ significantly between jurisdictions. See also, Murray Raff, 'Fraud and Land Title Registration Systems in International Comparative Perspective' (Presentation to World Bank, Washington DC, March 11, 2016) 3-4.

<sup>34</sup> See Benito Arruñada, 'A Transaction Cost View of Title Insurance and its Role in Different Legal Systems' (2002) 27 *The Geneva Papers on Risk and Insurance* 582; Benito Arruñada, *Institutional Foundations of Impersonal Exchange: Theory and Policy of Contractual Registries* (University of Chicago Press, 2012).

## 1.4 The Common Origins of the Torrens System

While there are as many forms of title by registration systems as there are jurisdictions, there is no doubt that it was the work of Sir Robert Torrens in the mid-1850's in the then colony of South Australia that led to its introduction.<sup>35</sup> While the sources of his inspiration are disputed<sup>36</sup> 'the one-time Collector of Customs [was] elected to Parliament on a mandate of land law reform and eventually [enjoyed] a term as Premier in the month of September 1857.'<sup>37</sup> In his own words, Torrens was greatly influenced by a friend of his who lost title to land, with this land being held within a recording based title system. His friend had made significant improvements to the land and despite this; no compensation was available for the loss of title.<sup>38</sup> The context is also relevant. As an emerging British colony, South Australia was in desperate need of a financial base to be spent at the behest of the colonial administrators, and the sale of land in line with the Wakefield method of colonisation,<sup>39</sup> a method that subsequently infiltrated New Zealand and Canada, was seen as the means to achieve this. If this was to occur however, the purchasers of real estate demanded certainty and security. Sir Robert Torrens answered this call. 'Torrens proposed a system of "independent" titles: in essence, upon each conveyance the land would be surrendered to the Crown, which would then re-grant it to the purchaser'.<sup>40</sup> Title by registration was then able to achieve reliability, simplicity, low-cost conveyancing, and suitability<sup>41</sup> to the circumstances facing mid-19<sup>th</sup> century South Australia. Today, in an era of electronic conveyancing and agents of the purchaser and vendor signing documents on behalf of these parties, rather than the parties signing themselves, can the system retain its coherence in light of the challenges posed by these changes? <sup>42</sup> My original research responds affirmatively and provides a dynamic assessment of where current thinking lies.

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<sup>35</sup> See generally, Taylor, above n 33.

<sup>36</sup> Ibid 19. It would be remiss not to mention that some legal historians have questioned Torrens role in the development of the system that now bears his name. For a discussion of this, see Taylor: at 33.

<sup>37</sup> Lynden Griggs, Rouhshi Low and Rod Thomas, 'Accounting for Risk: the advent of Capped Conveyancing Title Insurance' (2015) 24 *Australian Property Law Journal* 1, 2.

<sup>38</sup> Torrens, above n 6, v-vi.

<sup>39</sup> See above n 20.

<sup>40</sup> P Butt, *Land Law* (Thomson Reuters, 5<sup>th</sup> ed, 2006) [2003]. See Torrens, above n 6, 9, 34.

<sup>41</sup> These were seen as the hallmarks of what Torrens was trying to achieve, see Thomas R Ruoff, *An Englishman looks at the Torrens System* (LawBook Co, 1957).

<sup>42</sup> More will be said on this later, but the move from each party signing the contract and the forms that change ownership to one where an agent does this on the party's behalf is quite probably the most fundamental change to conveyancing since the introduction of the Torrens system.

[The Torrens register]... does make things better, cure invalidities, and make people's titles certain... The Torrens system therefore means the end of the need to look backwards for possible flaws.<sup>43</sup>

## 1.5 The Critical Dispute

Stripped of any embellishment or complication, the underlying dispute that occurs within land registration systems can be summarised in the following example:

A, is the true owner of the land. Through the fraudulent actions of a third party, the land is transferred to B who is bona fide. B is now the registered/recorded owner of the land. Who is entitled to the land, and who is entitled to compensation?

The answer to this lies at the crux of the difference between a recording based land registration system (ie general law land or old system title land in Australia) and title by registration systems such as Torrens. As Baird and Jackson state, 'we can protect a latter owner's interest fully, or we can protect the earlier owner's interest fully. But we cannot do both'<sup>44</sup> with numerous cases of fraud highlighting how easily the sale of land without the authority of the true owner can occur.<sup>45</sup> At general law, we protect A — the previous owner — the property flows to this individual; and compensation, if possible, to B. Title by registration fundamentally changes this. In adopting liability-based rules as regards A, whereby the value of the interest in the land is protected not by the return of the land, but the payment of compensation,<sup>46</sup> B becomes the owner of the land and A may be entitled, at least in Australia, to state sourced compensation. Title by registration protects the security of the transaction; general law land protects the security of the existing owner.<sup>47</sup> The differences between recording or deeds based

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<sup>43</sup> Taylor, aboven 33, 10.

<sup>44</sup> Douglas Baird and Thomas Jackson, 'Information, uncertainty, and the transfer of property' (1984) 13 *Journal of Legal Studies* 299, 300.

<sup>45</sup> As a modern illustration, see the fraud highlighted in this Australian Federal Police Media Alert: <<http://www.afp.gov.au/media-centre/news/afp/2013/august/media-release-arrest-in-nigeria-over-real-estate-fraud-attempt-in-australia.aspx>>.

<sup>46</sup> Judge Guido Calabresi and A Douglas Melamed, 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral' (1972) 85 *Harvard Law Review* 1089.

<sup>47</sup> O'Connor, above n 16.

land registration systems, and title by registration or Torrens systems, are summarised by Enemark as follows:<sup>48</sup>

	System	
	Deeds System	Torrens System
What the system does	It tells us who owns what	It tells us what is owned by whom.
What does the register do?	It records owners	It records properties and connects owners to those properties. [Title is also validated]
Legality of what is occurring	<b>Registration of Title</b> – no assurance by the state. Protection to the <b>static owner</b> .	<b>Title by Registration</b> – compensation for loss provided by the state, but this is not uniform across the Torrens jurisdictions. Protection generally afforded to the <b>dynamic nature of the transaction</b> , rather than <b>static ownership</b> . This is a consequence of immediate indefeasibility. <sup>49</sup>
Role of the Cadastre	Taxation – land tax imposition [the register also facilitated the transfer of information between parties interested in the one parcel of land, and was designed to reduce the extent to which land ownership had to be traced before a valid title could be claimed.]	Identification and title connection between people and the land.

How is it justified that the existing or past true owner of the land can lose title by the actions of someone acting fraudulently? The intuitive response for many would be that the existing landowner, the person who may have been in possession of that land for many years has an attachment and value associated with the land that is greater than the market value. In addition, members of the public could reasonably expect that their property cannot be illegally removed from their ownership and vested in the hands of another. Furthermore, many of the fraud-based scenarios involve financial institutions who have also been duped by the fraudster,<sup>50</sup> and the economic interest of the banks could easily be met by compensating for their financial loss, rather than removing the title of the natural person and allowing the financial institution the right to exercise a power of sale over the land. The answer as to why Torrens moves in the direction it does derives largely from economics. Under Pareto optimality, the most efficient

<sup>48</sup> Stig Enemark, 'Land Administration Systems' (overheads for lecture course, Land Administration Systems 2, 7<sup>th</sup> and 9<sup>th</sup> September 2004, overhead 8, copy held with authors). See also, Stig Enemark, 'Land Administration Systems – managing rights, restrictions and responsibilities in land' (Presentation to Map World Forum, Hyderabad, India, 10-13 February 2009).

<sup>49</sup> See generally, Rouhshi Low and Lynden Griggs, 'Immediate Indefeasibility – is it under threat?' (2011) 19 *Australian Property Law Journal* 222.

<sup>50</sup> Eg, *Yazgi v Permanent Custodians Ltd* (2007) 13 BPR 24, 567; *Solak v Bank of Western Australia* [2009] VSC 82; *Perpetual Trustees Victoria v English* [2010] NSWCA 32; *Russo v Bendigo Bank and Reichman* [1999] 3 VR 376; *Bank of South Australia v Ferguson* (1998) 192 CLR 248.

distribution of resources would see no individual worse off.<sup>51</sup> As the existing landowner may well have an interest in the land that cannot be measured by its economic value, Pareto optimality might suggest that in the dispute outlined above, A should prevail.<sup>52</sup> Under the Torrens system however, this is rejected. Where a dispute arises between the new purchaser and the previously registered proprietor, the system operates according to utilitarian principles. Instead of Pareto optimality, Kaldor-Hicks criterion is used, whereby gains and losses are looked at without recourse to the circumstances of the individual, and are instead considered as a whole.<sup>53</sup> The question is which course of action will maximise the utility for the greatest number of people. This demands that we consider overall net benefit and determine whether the costs that were imposed on parties that were disadvantaged, exceed the benefits gained by the favoured parties. When this view from above is taken, and the economic interests of the two innocent parties are masked so that identification of the landowner vis-à-vis the financial institution is not possible, the Torrens systems delivers a lower cost, more economically efficient method of land transfer than recording based systems.

The conclusion that Torrens systems deliver a more efficient method stems from the underlying principles of the curtain and the mirror. Without any need to investigate title, the conclusion we see in title by registration systems, specifically Torrens, is the destruction or deprioritising of the entitlement of the true or previous owner. For this disenfranchised individual, Australian states and territories will recompense this person in monetary terms, though not all international jurisdictions do this. In effect, the land register under a title by registration jurisdiction through its identification and publication of much of the relevant information that a transferee needs to know, will protect by property rules the interest of the purchasing party (ie through indefeasibility). The purchasing party, once registered, becomes subject to the risk that a later void and subsequently registered transaction could override their interest. The Torrens System undoubtedly leads to a dissonance between the security of title and security of the transaction, and as mentioned, it rejects the criterion of Pareto optimality because this 'affects the confidence that society requires for economic development.'<sup>54</sup> The reason

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<sup>51</sup> Arrieta-Sevilla, above n 25, 210-212.

<sup>52</sup> The inadequacy of Pareto optimality as a guide for this scenario is that there is no way that someone cannot be worse off; irrespective of what method of land registration is adopted, someone will always be worse off.

<sup>53</sup> Arrieta-Sevilla, above n 25, 210.

<sup>54</sup> Ibid.

economic development is impaired in recording based land administration systems is that without a clear guarantee of security over the land that is the subject of the transaction, financial institutions will increase their costs to cover the greater risk. Capital markets are influenced, directly and adversely. In saying this, it should be noted that these conclusions are not limited to financial institutions — they apply more broadly. In addition to the effect on financial institutions, the real estate market will face greater obstacles as purchasers factor in the higher risk that the transaction will not deliver the benefits that it should, resulting in a dampening of economic activity and a decreased willingness to engage in the housing market.<sup>55</sup> By contrast, where the purchaser is aware that the transaction will deliver certainty of title, vendors can expect to gain, as buyers are more willing to pay a higher price for the property, with mortgagees more comfortable in lending. Additional support for this reasoning can be seen in the economic critiques comparing title by registration land systems with registration of title systems. In determining which system leads to lower transaction costs, and which register delivers the more accurate information, both Arruñada,<sup>56</sup> and Miceli and Sirmans<sup>57</sup> conclude that the costs for the consumer of using title by registration registers will lead to better outcomes for the community. For purchasers within recording based systems, the purchaser will be required to take positive and costly steps to protect against loss, with the taking out of title insurance the most likely consequence. Having said this, Miceli and Sirmans do note that if considerations of distributive wealth are taken into account, both parties in conflict will prefer receipt of the land to the equivalent monetary value. These questions of distributive wealth lead to exceptions to the fundamental principles of Torrens. The narrative provided by the judiciary and the legislature in responding to this question of distributive justice need to articulate precisely and confidently why and when these exceptions are justified. Much of my work addresses this question as well as identifying steps consistent with Torrens that enhance the gatekeeper role of registration to limit the possibility of fraudulent transactions occurring and being registered. These steps can include enhanced verification of identity protocols, something currently occurring in the e-conveyancing environment, and additional measures associated with certificate of

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<sup>55</sup> See the comments by Arrieta-Sevilla, *ibid* 211.

<sup>56</sup> Arruñada, above n 34, Chapter 5, The Choice of Registration Systems.

<sup>57</sup> Thomas J Miceli and C F Sirmans, 'The Economics of Land Transfer and Title Insurance' (1995) 10 *Journal of Real Estate Finance and Economics* 81.

titles, such as the use of embedded codes and holographic images to prevent fraudulent copying.

Furthermore, when a title by registration system is combined with immediate indefeasibility we have a land registration model that is consistent with what should be expected by the public in a land registration system (although possibly not by individual members of the public who have lost ownership of land they once held), and with the legal principles that connect with these ideas.<sup>58</sup> With Pareto optimality, neither recording nor registration-based systems can be justified — at least one party is worse off. By contrast, with Kaldor-Hicks, title by registration and the adoption of immediate indefeasibility provides confidence and security with the conveyancing process, though there is the risk of loss of title to the innocent owner. The system provides the greatest good for the greatest number. With recording based systems or deferred indefeasibility within registration based systems, individual property owners may well attain some benefits, but this comes at the cost to all of society who now have greater obligations to undertake due diligence through the conveyancing process.

While some readers may have sympathy for the typical family facing the risk of losing their major asset, and there may be a general perception that any financial institution involved is more able to bear risk-reduction costs, such sympathetic feelings have no role in economic analysis.<sup>59</sup>

## 1.6 Indefeasibility – the Key to Torrens

The Australian resolution to the dispute outlined above between A and B has clearly and succinctly been resolved in favour of B — the person who buys from the fraudster. In 1971, the High Court of Australia accepted the notion of immediate indefeasibility as the doctrine of choice for the Torrens system.<sup>60</sup> Its resonance is still strong:

[The] principle is so important, and adherence to it so essential, that registered title [can] be challenged, under the legislative provisions in each of the States, only in the most exceptional circumstances. The Torrens system has enabled

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<sup>58</sup> *Breskvar v Wall* (1971) 126 CLR 376.

<sup>59</sup> Robin Edwards and Jennifer O'Reilly, 'The Duel between Immediate and Deferred Indefeasibility' [1999] *Singapore Journal of Legal Studies* 82, 110.

<sup>60</sup> *Breskvar v Wall* (1971) 126 CLR 376, 385-386 (Barwick CJ); 391 (McTiernan J); 396-398 (Menzies J); 400 (Windeyer J); 406 (Walsh J).

conveyance with certainty in Australia and, even though there may be occasions where notions of comparative justice may seem to have been transgressed, it is essential that indefeasibility of title is not undermined.<sup>61</sup>

For some, immediate indefeasibility is seen as statutory magic<sup>62</sup> in that what it does is ensure the recognition of a legally acceptable interest in land that begins from a transaction that would otherwise be void under principles of private law. But what immediate indefeasibility does is reinforce the notion that the collective goal of minimising the transaction costs associated with conveyancing and protecting the dynamic nature of the transaction, can only be supported by the adoption of immediate indefeasibility, though as noted in the quote above, there will undoubtedly be occasions where individual perceptions of justice will be challenged.<sup>63</sup> Arguably,<sup>64</sup> the acceptance of immediate indefeasibility may be traced to the work of Ruoff, who, in suggesting that the register was a mirror 'exerted a powerful normative influence on the subsequent development of the Australian Torrens system.'<sup>65</sup> The remaining ideas of Torrens, the curtain and the indemnity, are consistent with and support this visual image of what a mirror does, with the title reflecting only those interests that remain relevant to the land. The seminal New Zealand authority of *Fels v Knowles*<sup>66</sup> explains the importance of the register:

The cardinal principle of the [land registration statute] is that the register is everything, and that, except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world. Nothing can be registered the registration of which is not

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<sup>61</sup> *Perpetual Ltd v Barghachoun* [2010] NSWSC 108, [25].

<sup>62</sup> Seow Zhixiang, 'Rationalising the Singapore Torrens System' (2008) *Singapore Journal of Legal Studies* 165, 166.

<sup>63</sup> The criticisms of immediate indefeasibility have recently been articulated by Sam Boyle, 'Fraud against the Registrar: Why the 'De Jager line' of authority is incorrect, and how unfairness caused it to arise' (2015) 24 *Australian Property Law Journal* 305. Boyle suggests that it is absurd that mortgagees registering forged mortgages should obtain the benefits of indefeasibility (see 324-326). Boyle considers that the weight of unfairness and the present 'destabilisation of the case law' (see 326) should lead to Australian courts considering deferred indefeasibility. This author disagrees with Boyle in that deferred indefeasibility will only add transaction costs for all purchasers of real estate, and more nuanced measures to ameliorate the harshness of immediate indefeasibility can be introduced. These measures can include enhanced security protocols and increased requirements on financial institutions to verify identity.

<sup>64</sup> It should be noted that Australia did originally adopt deferred indefeasibility (*Clements v Ellis* (1934) 51 CLR 217). This decision was overturned in *Breskvar v Wall* (1971) 126 CLR 377, 387 (Barwick CJ).

<sup>65</sup> Christensen and Duncan, above n 30, 116.

<sup>66</sup> (1906) 26 NZLR 604.



expressly authorised by the statute. Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest, or in the cases in which registration of a right is authorised, as in the case of easements or incorporeal rights, to the right registered.<sup>67</sup>

### 1.7 The Move from Paper Based Conveyancing to Electronic Conveyancing

My work reflects a critical analysis of this principle of indefeasibility, applied to a number of key areas of dispute within the Torrens system. My more recent work considers the legislative and technical issues, policy conundrums, and doctrinal issues that arise in the context of electronic conveyancing. The move to electronic based conveyancing is inexorable<sup>68</sup> and presents key risks that derive from a change in the allocation of risk within the electronic environment, as well as the opportunity to commit frauds impossible through a paper-based system. Critically, the move to electronic conveyancing will, as noted, involve the most significant and fundamental changes to conveyancing practice that this country has seen since the introduction of the Torrens system some 170 years ago. Whereas the Torrens system required or mandated the change of the register following the lodgement of dealings signed by the parties to the transactions, electronic conveyancing will fundamentally alter this so that an agent — most likely a conveyancing agent or solicitor — will sign those documents on behalf of the transacting party. Embedded within the rules for the Property Exchange Australia (PEXA) are requirements for the solicitor or conveyancing agent to verify the identity of the party for whom they are acting and the owner of the land; connect these two; and, be confident within themselves that the client controls the right to deal with the land.<sup>69</sup> If the move to electronic conveyancing were to result in a less secure land title system, sellers and buyers of real estate, mortgagees, and those involved with investment in property, can expect significantly higher conveyancing fees, and for the stakeholders such as the conveyancing agent, significantly higher insurance premia. With the move to electronic conveyancing now being rolled out, and its implementation

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<sup>67</sup> Ibid 620. The New Zealand authorities have recently suggested that immediate indefeasibility be retained, but that it be subject to an overriding judicial discretion to overturn in cases of manifest injustice. For a discussion of this, see Rod Thomas, 'Reduced Torrens Protection: The New Zealand Law Commission Proposal for a New Land Transfer Act', in press.

<sup>68</sup> Though note in the UK, progress has been halted. See the comments detailed in Land Registry, *Report on responses to e-conveyancing secondary legislation part 3*, 2011.

<sup>69</sup> Schedule 8, Model Participation Rules, Version 3, 2015 accessible at <[www.arnecc.gov.au](http://www.arnecc.gov.au)>.

likely to be completed in Australia by 2017, the casualties of the past that have included the e-conveyancing system originally rolled out in Victoria, as well as the steps taken in the United Kingdom will be long forgotten.<sup>70</sup> Having said this, we will be doomed to repeat history should we forget the lessons learnt from those missteps. Accordingly, my work, which as long as 15 years ago, explored the possibility of aligning the transfer of property to the model that we see for the sale of equities,<sup>71</sup> will only come to realisation if our doctrinal understanding of what it is to be a true Torrens system remains clear and paramount in the minds of those who are tasked with implementing legislative developments, judicial interpretation, or policy evolution.

## 1.8 Research Questions and Aim of the Research

With this context in mind, my overarching research question has been to consider:

- To what extent have the judicial and legislative developments concerning title by registration achieved doctrinal coherence with the ideas that underlie a title by registration (or Torrens) system of land registration?

The hypothesis tested by this research is as follows:

- Ameliorating the sometimes harsh results of Torrens disputes through reference to broad notions of fairness underpinned through common law or statutory exceptions, or recognition of possessory interests, or by lax security measures as we digitise the register and the process of conveyancing, will only undermine the ideas that provide the foundation to title by registration, and lead to as many, if not more questions than it resolves.

This broader hypothesis requires consideration of the way in which equitable, or non-registered interests are catered for within title by registration systems, the role of possessory interests within these systems, and the manner in which electronic

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<sup>70</sup> The Victorian E-conveyancing model was rejected by the conveyancing agents as it transferred risk to them. After spending some \$40-50ml, only one transaction was carried out. See Benito Arruñada, 'Leaky Title Syndrome' (2010) *New Zealand Law Journal* 115, 118. In the United Kingdom, the introduction of e-conveyancing was said to have led to a 'massive increase' in fraud. See Ross W Martin, 'The Threat to Indefeasibility of Title under the Land Registration Act 2002' [2012] *Southampton Student Law Review* 15, 22.

<sup>71</sup> For example, with the sale of equities on the Australian Stock Exchange, the buyer of equities need only establish their identity with an online broker, arrange for the integration of an account from which monies used for the purchase of equities can be withdrawn and to where monies from the sale of equities can be deposited, and then utilise private key infrastructure such as passwords to verify the identity of the individual when purchasing equities.

conveyancing has the potential to undermine or improve the key indicators of a successful land registration system.

The aim of my research has been to:

- I) provide a doctrinal understanding of what the law is, and to highlight any inconsistencies within the current law and how they relate to the goals of title by registration;
- II) consider whether the system remains justifiable through the prism of economics and consumer law; and
- III) consider how key indicators for title by registration align with the introduction of electronic conveyancing and the changes in the process that this will necessarily involve.

To this end, and while the change to electronic conveyancing was intended to have no effect on the substantive law, the argument raised in my recent work is that this will only be achieved if the underlying elements of Torrens (the curtain, mirror and indemnity) are at the forefront of academic and legislative thinking as the jurisprudence of e-conveyancing system evolves. The importance of this cannot be underestimated. As judges and legislators ‘continually [strive] to perfect the law’s coherence’,<sup>72</sup> so too must academics seek to ‘unite all the disparate elements of [title by registration] into one coherent whole.’<sup>73</sup>

## 1.9 Research Methodologies

The primary research method used has been to obtain a doctrinal understanding of title by registration in Australia to determine whether:

- the ideas that originally drove Sir Robert Torrens to introduce the legal system that bears his name have been maintained;
- the interpretation of the Torrens legislation and the common law principles supports these ideas;

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<sup>72</sup> Michael Gilleooly, ‘Legal Coherence in the High Court: String Theory for Lawyers’ (2013) 87 *Australian Law Journal* 33, 48.

<sup>73</sup> Ibid.

- the irresistible move towards, and most recently, the enactment of electronic conveyancing can further advance the aims of title by registration; and
- what are the key ingredients of a secure land registration system?

‘In many cases the most difficult research question of all is what is the law and those engaged in doctrinal analysis will seek to answer this.’<sup>74</sup> With ‘doctrinal’ representing the adverb form of the noun doctrine, the Macquarie Dictionary, in noting the etymology is originally Latin, then French and finally Middle English, defines doctrine as a ‘body or system of teachings relating to a particular subject.’<sup>75</sup> As a discrete research methodology this has critically required the identification of the system that underpins title by registration and an examination of the case law and legislation (often across all six states and two territories),<sup>76</sup> as well as the secondary material, including empirical data such as the extent of claims on the assurance fund, that influences our understanding of the Torrens system. In identifying the system that is title by registration, something significantly more than a synthesis of existing knowledge was required. It demanded that I question how the elements of the mirror, curtain, and indemnity align with the common law as enunciated by often diverse and diverging courts and, as we move from paper to electronic conveyancing, how title by registration will continue to evolve into a coherent and internally consistent legal system. The doctrinal method is one that aligns squarely with the demands of the profession of law,<sup>77</sup> and can be said to be the starting point for all legal investigation. While it is ideally suited to the practice of legal problem solving, doctrinal study as an academic research methodology does significantly more. Without an understanding of what the law is, theoretical, comparative, and interdisciplinary research will not have the context that it needs to find its grounding. As identified by the Council of Australian Law Deans in noting the importance that doctrinal research plays in the academe of law:

To a large extent, it is the doctrinal aspect of law that makes legal research distinctive and provides an often under-recognised parallel to “discovery” in the

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<sup>74</sup> Martin Dixon, ‘A Doctrinal Approach to Property Law Scholarship: Who Cares and Why?’ (2014) 3 *Property Law Review* 160, 161.

<sup>75</sup> Susan Butler (ed), *The Macquarie Dictionary* (Macquarie Dictionary Publishers, 2013).

<sup>76</sup> The current Torrens statutes are as follows: *Real Property Act 1900* (NSW); *Transfer of Land Act 1958* (Vic); *Land Title Act 1994* (Qld); *Real Property Act 1886* (SA); *Transfer of Land Act 1893* (WA); *Land Titles Act 1980* (Tas); *Land Titles Act 1925* (ACT); *Land Title Act* (NT).

<sup>77</sup> Terry Hutchinson, ‘Doctrinal Research – researching the jury’ in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Taylor and Francis, Florence, 2013) 28 (Chapter 1).

physical sciences. Doctrinal research, at its best, involves rigorous analysis and creative synthesis, the making of connections between seemingly disparate doctrinal strands, and the challenge of extracting general principles from an inchoate mass of primary materials. The very notion of 'legal reasoning' is a subtle and sophisticated jurisprudential concept, a unique blend of deduction and induction, that has engaged legal scholars for generations, and is a key to understanding the mystique of the legal system's simultaneous achievement of constancy and change, especially in the growth and development of the common law. Yet this only underlines that doctrinal research can scarcely be quarantined from broader theoretical and institutional questions. If doctrinal research is a distinctive part of legal research, that distinctiveness permeates every other aspect of legal research for which the identification, analysis and evaluation of legal doctrine is a basis, starting point, platform or underpinning.<sup>78</sup>

Doctrinal research in law is, as Hoecke describes, 'a mainly hermeneutic [interpretative] discipline, with also empirical, argumentative, logical and normative elements.'<sup>79</sup> It imposes a significant intellectual challenge, the capacity, particularly in a federation, to understand and make sense of different contexts and approaches, and requires great depth of knowledge.<sup>80</sup> This demands a research methodology that necessitates the generation of an idea that is worth investigating, and from this, the research process evolves to isolate where the information is to be found, much of which will be on the public record.

More explicitly, this has required:

- I) The identification of the research question, with this often provoked by either case law developments, legislative change, private consultancy, or the work of

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<sup>78</sup> Council of Australian Law Deans, *Statement on the Nature of Legal Research*, (2005) 3 <[www.cald.asn.au](http://www.cald.asn.au)>.

<sup>79</sup> Mathias M Siems and Daithi M Sithigh, 'Mapping Legal Research' (2012) 71 *Cambridge Law Journal* 651, 653, citing Mark van Hoecke, 'Legal Doctrine: Which Method(s) for what Kind of Discipline' in Mark van Hoecke (ed), *Methodologies of Legal Research* (Oxford, 2011) 1, 17.

<sup>80</sup> See the comments by Richard A Posner, *How Judges Think* (Harvard University Press, 2008) 211. Criticisms that doctrinal research is inflexible, formalistic, rigid and failing to connect the law to the context is, in the opinion of this author, wrong (see the authors cited by Rob van Gestel and Hans-Wolfgang Micklitz, *Revitalizing Doctrinal Legal Research in Europe: What about Methodology?* (European University Institute Working Papers Law, 2011) 2. It fails to take account of the complexity of doctrinal legal research, the value it can add in ensuring that the legal system is not only coherent for legal practitioners and the academe, but that it can meet the broader community expectations; the context is always very much at the forefront of my thinking. My work has always sought to ensure that the fundamental tenets of the Torrens system evolve as the paper-based conveyancing moves to electronic conveyancing.

law reform bodies. In so doing, I sought to obtain objective evidence that the issue exists, and is worth researching. This approach required scoping the problem in a way that made the publication worthwhile in terms of adding to the current literature and has involved, at times, comparative and interdisciplinary work as well as the more traditional inductive reasoning<sup>81</sup> of doctrinal legal research to identify a response to a specific legal problem. While it is accepted that inductive reasoning, the staple of legal analysis, does involve considerable risk, the research methodology adopted has been to further justify the conclusion ultimately made through the use of approaches that may be interdisciplinary (eg, consumer paradigms or economics), or through deductive reasoning that relates to and is transparently expressed in light of the elements that underpin title by registration, or the values that align themselves with this system of land registration.

- II) Having justified the problem, the next step was to isolate the criteria against which the current law was to be studied, and to identify inconsistencies between jurisdictions, or to isolate where the legislation or case law principle failed to align with the overarching elements. These criteria had to be justified, and in terms of title by registration systems, it has largely required identification of what a successful and secure land registration system should achieve.
- III) An overview of the primary and secondary material, (ie current cases, legislation, and literature) was then provided. This was done not in the sense of a literature review of the humanities, but to ensure that differences of opinion would be exposed, and contrasting viewpoints evaluated, against the identified criteria. It also ensured that what is new is built onto the current framework, and then judged as to whether it makes the system more or less coherent, and if less, what should be done to correct that (the research phase).
- IV) The process of writing then sought to synthesise, explain, evaluate, and where necessary creatively and originally address the shortcomings that are inherent in the current doctrinal understanding (the writing phase). 'Deciding in hard

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<sup>81</sup> For a discussion of this, see Douglas Lind, 'Basic Categories of Arguments in Legal Reasoning' (2014) 11(4) *The Judicial Review* 429, 431: 'the common law method of doctrinal development through case law, as well as the general norm known as "the Rule of Law" — that like cases should be decided alike — are grounded logically in inductive reasoning.'

cases implies that existing rules will be stretched or even replaced but always in such a way that in the end the system is coherent again.’<sup>82</sup>

My original work in answering the research question as to whether there has been, and will continue to be, doctrinal coherence within the Torrens system influences the development of the law through the identification of inconsistencies. At its heart, it ensures that the paramount confidence that we should have in title by registration is maintained and if needed, changed and enhanced. The consequences of a failure to do this are significant, not only for economic growth but for social cohesion as well. Allied with this has been interdisciplinary work<sup>83</sup> where I seek to provide further support for the current operation of title by registration. The law does not exist in a vacuum and has both a functional and leadership role in ensuring community cohesion. If the application of an economics or consumer law framework did not support the coherence of title by registration, then the system would need to evolve or justify its ongoing shape. Finally, I have taken a law reform approach to the Torrens system and asked why in particular areas (possessory interests and easements being the most notable); the law should change. Necessary to this methodology has been a need to justify why change is warranted, or not, and how that change, or the existing state of affairs, meets the expectations of the community at large and aligns with the ideas that are the foundation of title by registration.

### 1.10 Limitations of the Research

There is no one system of title by registration. Within the Australian states and territories, let alone when international comparative work is undertaken, there are jurisdictional specific differences. Having said this, all title by registration systems within the Torrens family do emanate from a common origin and share at least two of the three elements and core ideas of the Torrens system (these being the curtain and the mirror; many countries don't have an assurance fund or indemnity provision). My research has focussed at the applied level of whether the aims of title by registration systems, specifically Torrens, have provided a convincing narrative as to how the

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<sup>82</sup> van Gestel and Micklitz, above n 80, 26.

<sup>83</sup> For example Lynden Griggs, 'Torrens Title in a Digital World' (2001) 8(3) *Murdoch University Electronic Journal of Law (Digital World)*; Lynden Griggs, 'Resolving the Debate Surrounding Indefeasibility through the Eyes of a Consumer' (2009) 17 *Australian Property Law Journal* 260 (*Indefeasibility*).

substantive law should operate in line with those principles, and in that narrative, whether the opportunity for fraud and other actions that weaken title by registration have been minimised. In doing this I have sought to address the overarching research question through deductive and inductive legal reasoning, to demonstrate that coherence can be maintained and enhanced if we adhere to the fundamental and underlying elements of the curtain, mirror, and the indemnity.

Second, the Torrens system of land registration is not the only form of title by registration system currently operating. Germany, and adopters of the German style of land registration, such as Austria, Switzerland, Poland, Czech Republic, Slovakia, South Korea, Taiwan, Greece, and to a lesser degree China and India, choose a form of title security where the registered title is also unchallengeable. In these European and Asian jurisdictions, the major difference with Torrens is that notaries authenticate the transactions submitted for registration. The United Kingdom form of land registration was heavily influenced by the German model,<sup>84</sup> and while it was arguably intended to achieve the same level of security as indefeasibility, current cases seem to be 'steadily derailing the orthodox, formalistic interpretation of the [English land registration statute].<sup>85</sup> In the main, my research has not sought to undertake a comparative study between Torrens and other models of land registration systems, though it should be noted that, as I have written in my more recent articles,<sup>86</sup> the requirement of verification of identity standards has seen a convergence between title by registration in the Torrens form, and the German idea of public faith in the register through the use of notaries.<sup>87</sup>

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<sup>84</sup> See the discussion in M Raff, 'Fraud and Land Title Registration Systems in International Comparative Perspective' (Paper presented at the 2016 World Bank Conference on Land and Poverty, Washington DC, 14-18 March 2016).

<sup>85</sup> Amy Goymour, 'Mistaken Registrations of Land: Exploding the Myth of Title by Registration' (2013) 72 *Cambridge Law Journal* 617, 646. For a discussion and comparison of the UK with Australia, see Penny Carruthers, 'A Tanged Web Indeed: The English Land Registration Act and Comparisons with the Australian Torrens System' (2015) 38(4) *University of New South Wales Law Journal* 1261.

<sup>86</sup> For example, see R Low and L Griggs, 'Identity Verification in Conveyancing: The Failure of Current Legislation and Regulatory Measures, and Recommendations for Change' (2012) 76 *The Conveyancer and Property Lawyer* 363.

<sup>87</sup> Raff, above n 84.



Third, while I am aware of the theoretical work of writers such as Merrill and Smith,<sup>88</sup> Coase,<sup>89</sup> and Calabresi and Melamed,<sup>90</sup> I have not sought, for the most part, to introduce this work into the body of my research. There is no doubting that, for example, the view of Coase that transaction costs can impede the operation of a market exchange for land, could be used to support a Torrens system of land registration when compared to a recording system, which necessarily involves higher search costs. Further, the operation of liability-based rules provides additional support for title by registration, something noted by me in 2001.<sup>91</sup> Similarly, the work of Smith and others<sup>92</sup> on *numerus clausus* could be applied to the Torrens system of land registration as the costs of registration based systems are reflected in the administrative costs of maintaining a registry that is publicly accessible, accurate, and in the case of Australia, supported by state-funded assurance funds. If the number of property interests expand, either the registry will need to evolve to cater for these interests, discussion of which has been undertaken in the Australian context by O'Connor, Christensen, and Duncan,<sup>93</sup> or the costs of searching and finding out about these interests (the costs of gaining that information) will dramatically increase. By limiting the number of interests relevant to land, the transaction costs are lowered, which links with Coase's argument that by lowering transaction costs, markets are enhanced. My work has been doctrinal and has sought to operate at the very coalface of how the Torrens system is operating in its interpretation and applicability to the substantive principles of property law, with the dissemination of this work occurring through peer-reviewed publications nationally and internationally, as well as, monographs and law reform submissions.

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<sup>88</sup> Eg, Thomas W Merrill and Henry E Smith, 'The Property Contract Interface' (2001) 101 *Columbia Law Review* 773; Yun-chien Chang and Henry E Smith, 'The Numerus Clausus Principle, Property Customs, and the Emergence of New Property Forms' (2015) 100 *Iowa Law Review* 2275.

<sup>89</sup> Ronald H Coase, 'The Problem of Social Cost' (1960) 3 *Journal of Law and Economics* 1.

<sup>90</sup> Above n 46.

<sup>91</sup> See Griggs, above n 83, in quoting from the work of Calabresi and Melamed, above n 46; See also Louis Kaplow and Steven Shavell, 'Property Rules versus Liability Rules: An Economic Analysis' (1996) 109 *Harvard Law Review* 713.

<sup>92</sup> Such as Brendan Edgeworth, 'The Numerus Clausus Principles in Contemporary Australian Property Law' (2006) 32 *Monash University Law Review* 387; Pamela O'Connor, 'Contractual Specifications of New Property Rights in Resources: The Problem of Measurement Costs' (2013) 39 *Monash University Law Review* 38; Michael Weir, 'Pushing the Envelope of Proprietary Interests: the Nadir of the Numerus Clausus Principle' (2015) 39 *Melbourne University Law Review* 651.

<sup>93</sup> Sharon Christensen, Bill Duncan and Pamela O'Connor, 'Regulating for Sustainability' (March 2011) <[http://eprints.qut.edu.au/41637/1/1193-QUT\\_SustainPropertyW.pdf](http://eprints.qut.edu.au/41637/1/1193-QUT_SustainPropertyW.pdf)>.

Fourth, a PhD by Published Work necessarily involves a review deconstructing one's research, which in my case extends over 18 years. This inevitably has involved a reflective view of what has been written in the past, and at times a more nuanced later reflection.



## Chapter 2: Linking the Publications to the Research Questions and the Methodologies Adopted

In this section I intend to demonstrate how my work has consistently argued in an innovative and chronologically progressive way that title by registration can retain its internal consistency, and still have the confidence of the community. In addition, I will show that it can provide security to the vast array of land interests that are recognised in Australia, and be an ongoing and trusted part of the cadastre on which to build the foundation of private land ownership. Within an overarching theme of coherence, built around a preference for the principle of immediate indefeasibility,<sup>94</sup> my work seeks to answer whether there is doctrinal consistency within the Torrens system of land registration and why immediate indefeasibility is to be preferred over deferred indefeasibility. In this chapter, I first examine the underlying dilemma that led me on this path of research, before considering some of the key doctrinal areas of dispute. These areas include the importance of caveats, how and whether to recognise unregistered interests, the role of in personam interests, and most recently, the introduction of electronic conveyancing. I will also consider the ongoing debate in relation to indefeasibility, the current relevance of possessory interests, and how interdisciplinary analysis has been used to support my analysis.

### 2.1 The Underlying Dilemma in Land Transactions

In 1997,<sup>95</sup> I began with the question that was to underlie my work for the next 18 years: how is land law going to resolve the ‘dilemma of competing claims to real property by people who can be designated as innocent parties’?<sup>96</sup> We know that when the registered landholder has had their identity stolen or their credentials forged, and their land has been transferred to a new purchaser, the law can favour either the new purchaser or the existing registered proprietor. This same question, addressed close

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<sup>94</sup> Immediate indefeasibility recognises that a purchaser of land obtains a title subject only to such estates and interests as are noted on the register. Deferred indefeasibility grants indefeasibility but only where the transaction is between two parties innocent of wrongdoing. For example, a transfer from a person stealing the identity of the registered proprietor to an innocent purchaser gives an immediately indefeasible title. Deferred indefeasibility would defer the grant of indefeasibility to a purchaser from the person who received title from the wrongdoer. Immediate indefeasibility is adopted in Australia: *Breskvar v Wall* (1971) 126 CLR 376, 385-386.

<sup>95</sup> Lynden Griggs, ‘Torrens Title – Arise the Registered and Unregistered, Befall the Legal and Equitable’ (1997-1998) *Deakin Law Review* 35.

<sup>96</sup> *Ibid.*

to two decades ago, has new clothing in the form of electronic conveyancing — do the computer systems, IT controls, and the move from the parties individually signing to agents signing on behalf of the parties, provide a new fertile field of potential problems.

When dealing with a dispute between two innocent parties in relation to land, the land, the subject of dispute, cannot be split. The coherence of the Torrens system is dependent on a recognition of this, and an understanding that to favour one person over the other is to make a conscious choice that will favour one party but disadvantage another — both of whom are not blameworthy for what has transpired. The articulation and transparency of the considerations that underpin those choices is what is critical. Indeed, reasonable people will often be at different ends of the continuum as to where we should be led in terms of resolution. In many scenarios, the contest is between the individual defrauded by the actions of another, with the imposter having taken security over the land from a duped financial institution.<sup>97</sup> The contest will be between the mortgagee financial institution and the defrauded landowner, both of whom are innocent of any wrongdoing. In addressing my overarching research question, I suggest that:

The solution in the case of registered or Torrens title land has been to protect, in the main, the innocent purchasers of title. This has permitted a conveyancing system, which is relatively inexpensive, quick, and for the most part, accurate, to flourish. The philosophy behind this system is the provision of a conclusive title, a registration system that the state guarantees as a mirror of the title.<sup>98</sup>

## 2.2 What are the Key Elements?

In my initial article,<sup>99</sup> I undertook a doctrinal research methodology to consider the history of the Torrens system, the common law authorities, academic argument, and identify how these ideas and rules connect with the elements of Torrens. This article, published in the *Deakin Law Review*, examined whether the law of real property should be prepared to

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<sup>97</sup> For discussion around the taxonomy of frauds associated with title by registration transactions, see Lynden Griggs and Rouhshi Low, 'Identity Fraud and Land Registration Systems: An Australian Perspective' (2011) 75 *The Conveyancer and Property Lawyer* 285-308.

<sup>98</sup> Griggs, above n 95.

<sup>99</sup> Griggs, above n 95.

[D]ispense with the determination of priorities by the nature of the interest and instead turn to a system whereby Parliament mandates the registration of certain interests, the availability of caveating for those interests that cannot be registered and for priority to be resolved by the date of registration or lodgement of the caveat.<sup>100</sup>

I submitted that coherency within title by registration would be achieved by some form of mandated caveating procedure for the unregistered interest, and that if the Register is to be the mirror of all matters influencing the title, then such a measure is needed and required. This article also noted that while the division between legal and equitable interests was not entertained by Sir Robert Torrens (his view was that unregistered interests were mere personal interests),<sup>101</sup> the more radical idea that the division between legal and equitable interests as they related to estates in land could be abolished was not likely to be accepted. I did suggest that the failure to address this division has allowed the ghosts of the registration of deeds system to continue to 'haunt the interpretation of the new Torrens statute.'<sup>102</sup>

By continuing this separation between legal and equitable through to priority disputes, we have allowed the goal of a cheap, safe and quick conveyancing system to be [contaminated] by historical divisions between law, equity, personal equities, and equities coupled with a proprietary interests — divisions which are not consistent and need not be maintained.<sup>103</sup>

Accordingly, it is suggested that while we continue to identify interests as legal or equitable within a title by registration system, rather than registered or not, our dispute resolution processes, by adopting general law principles designed for a recording based land administration process, has the potential to undermine the coherence of the Torrens system.

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<sup>100</sup> Griggs, above n 95, 35.

<sup>101</sup> Mary-Ann Hughson, Marcia Neave, and Pamela O'Connor, 'Reflections on the Mirror of Title: Resolving the Conflict between Purchasers and Prior Interest Holders' (1997) 21 *Melbourne University Law Review* 460, 461.

<sup>102</sup> Griggs, above n 95, 39, quoting William Duncan and Lindy Willmott, *Mortgages Law in Australia* (Federation Press, 2<sup>nd</sup> ed, 1996) 2.

<sup>103</sup> Griggs, above n 95, 46. The relationship between law and equity is considered further in section 2.3.

This early doctrinal research identified the three key elements that lay behind the Torrens system. These elements enable a structured and internally consistent framework to be applied to all Torrens disputes. These were, as previously noted:

- the curtain, which need not be drawn back;
- the mirror, what is reflected back at you is all that binds you; and,
- the indemnity: a person who has lost an interest in land due to the operation of the Torrens system, in circumstances where they would not have lost that interest under a recording based system, able to receive monetary compensation.

I also suggested that the process for conveying land (subject to the additional requirements to ensure a good title be passed from vendor to purchaser) should be no more complex than the purchase and sale of equities on the stock exchange.<sup>104</sup> The contemporary relevance of this, and demonstrating its ongoing resonance, is that my most current work draws more fully on this idea, as electronic conveyancing becomes a reality. My references in 1997 to the use of the stock exchange as an archetypal model for the conveyance of land were somewhat prescient given the recent establishment of the Property Exchange Australia (PEXA).<sup>105</sup> This entity, currently owned by the five most populous state governments and the major financial institutions, has established an electronic conveyancing framework that will allow a national approach to the process of conveyancing, if not provide some impetus to a national Torrens code. This development has the potential to advance the aims of the Torrens system, though as I have written,<sup>106</sup> what we have learnt from the failures of other jurisdictions in establishing electronic conveyancing is the need to be mindful of security.<sup>107</sup> In seeking to address these security measures I have suggested that what is critical is the need to verify identity, connect ownership of that person to the land, and ensure that they have the right to deal in relation to that land (ie commonly a mortgagee can control the right to deal).<sup>108</sup> Staying true to the ideas that underpin the

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<sup>104</sup> Griggs, above n 95, 47.

<sup>105</sup> See Property Exchange Australia (PEXA) <[www.pexa.com.au](http://www.pexa.com.au)>.

<sup>106</sup> Rod Thomas, Lynden Griggs and Rouhshi Low, 'Electronic Conveyancing in Australia – is anyone concerned about security' (2014) 23 *Australian Property Law Journal* 1 (not primary author).

<sup>107</sup> Ibid 2.

<sup>108</sup> Rod Thomas, Rouhshi Low and Lynden Griggs, 'Australasian Torrens Automation, Its Integrity and the 3 Proof Requirements' (2013) 2 *New Zealand Law Review* 227-262 (not primary author).

Torrens system and the legal principles that flow from this must ultimately come down to preventing abuse of the register and ensuring the register accurately reflects all interests that pertain to that parcel of land. The importance of this work is that the electronic conveyancing protocols through the model operating rules and model participation rules<sup>109</sup> reflect much of this thinking.

[Q]uestions [concerning] who should bear the risk in terms of abuse of the register remain unclear and it is likely these questions will not be fully resolved until litigation transpires. What is certain is that too great a risk of abuse can lead to loss of public confidence in the register and increased transactional costs. We must balance the potential of the harshness of Torrens registration outcomes, on the one hand, and the need to have a land transaction that is inexpensive, secure and effective.

### 2.3 What is the Role of Caveats and Restitution in meeting these Key Points?

The conclusion that I reached in 1997 as to the importance of caveating still has relevance, with this highlighted by the High Court in *Black v Garnock*.<sup>110</sup> In this case, a purchaser failed to caveat to protect their estate contract, and in the hours before settlement, a writ of execution was lodged against the title. The interest referenced by this writ, prevailed over the estate contract of the purchaser.<sup>111</sup> What was significant about this case is that the judgement of Justice Callinan in perhaps a portend of things to come, lamented the catastrophic consequences for the purchaser. In his Honour's view, these consequences would not have happened if the purchaser had lodged caveats in protection of their interests. No compensation was available from the assurance fund for what was ultimately a very significant loss.<sup>112</sup>

The questions raised in this case would be unlikely to have arisen had those salutary practices [ie caveating] not fallen into disuse, whether by reason of electronic recording of dealings or otherwise, although it is difficult to understand, why some comparable prudent practice would not equally, and perhaps more

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<sup>109</sup> The model operating rules and model participation rules can be located at: <http://www.arnec.gov.au/publications>.

<sup>110</sup> *Black v Garnock* (2007) 230 CLR 438.

<sup>111</sup> The case is examined in more detail in section 2.5.

<sup>112</sup> *Black v Garnock* (2007) 230 CLR 438, [52].



easily, have been adopted there to accommodate electronic lodgement, searching and recording.<sup>113</sup>

Further doctrinal research into unregistered interests was explored again in 2001 in an article published in the *Queensland University of Technology Law Journal*.<sup>114</sup> In this instance, I expanded my discussion of unregistered interests and raised the still contemporary issue of how restitutionary claims should fit within a modern land registration system dealing with registered/unregistered interests rather than the more historically based division between legal and equitable interests. In seeking to isolate whether there is doctrinal consistency between the ideas and principles that should drive the Torrens system I asked:

[This conundrum] is at the heart of the issue in this paper. Should a personal equity arise in circumstances of what is ultimately policy motivated relief — where to allow the claim cuts back the operation of the Torrens legislation? That is, if the acts of the registered interest holder do not involve any misrepresentation, there is no misuse of power, no improper attempt to rely on legal rights and no knowledge of wrongdoing, should these goals of the Torrens system override the principles [that] permit a remedy being granted to an aggrieved individual.<sup>115</sup>

In undertaking this examination,<sup>116</sup> close consideration was given to the High Court decision in *Garcia v National Australia Bank Ltd*.<sup>117</sup> Garcia and her then husband executed a registered mortgage over their home. The mortgage secured all monies that the parties presently owed and which they may come to owe in the future. Subsequently, Garcia signed a number of guarantees in favour of the National Australia Bank with those guarantees relating to the business activities of her husband. Following the separation and divorce between the parties, Garcia sought a declaration that the guarantees were of no force or effect. While this case was decided by the doctrine of unconscionability,<sup>118</sup> my examination focused on the extent to which the National Australian Bank might have succeeded in arguing that its registered security

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<sup>113</sup> Ibid [53].

<sup>114</sup> Lynden Griggs, 'In Personam, *Garcia v NAB* and the Torrens System – Are they Reconcilable' [2001] *Queensland University of Technology Law Journal* 76.

<sup>115</sup> Ibid.

<sup>116</sup> It should be noted that this article was cited by the significant New Zealand Supreme Court decision of *Dollars & Sense Finance Ltd v Nathan* [2007] 2 NZLR 747, [145].

<sup>117</sup> (1998) 72 ALJR 1243.

<sup>118</sup> Ibid [27]-[34].

attained the status of indefeasibility. After all, there was no evidence before the court that suggested that the bank had engaged in any sense of personal dishonesty or moral turpitude, the normal criteria for establishing statutory fraud within the Torrens system. There was acceptance, however, that the bank had engaged in unconscionable behaviour. In holding in favour of Mrs Garcia, the High Court relying by analogy on its own jurisdiction to set aside gifts made by mistake; the ability to provide relief to a surety; and, the capacity to reject the enforceability of a document where there is a failure to disclose material features of the transaction.<sup>119</sup> My view was that unconscionability of itself could not explain this result. Coherence demands that the connection between the equitable doctrine of unconscionability and the Torrens system of land registration be considered. My concern was that the aim of controlling certain species of transactions by equitable means might see the dilution or damaging of established ideas and undermine the principles that support what we are trying to achieve in establishing a radically new form of land administration.<sup>120</sup> Relief was given to Mrs Garcia on the basis that the bank had been unconscionable in retaining the benefit of the guarantee, rather than that the bank had been unconscionable in this acquisition. This answer however, does not tell us on a justifiable basis as to why the lending bank ought to have relinquished its security. I echoed the concerns of Moore:

[V]ague and amorphous concepts such as unconscionability would, if sufficient on its own to defeat a registered interest in land, drive a horse and buggy through the Torrens system. That is precisely the reason why the courts have insisted that a personal equity must be founded upon a recognised legal or equitable cause of action.<sup>121</sup>

The contemporary relevance of this can be seen with the High Court recently endorsing a view that the Torrens system should not be undermined where there is no evidence of wrongdoing by the registered proprietor. The case, *Farah Constructions v Say-Dee*,<sup>122</sup> the subject of a case note by me in 2008,<sup>123</sup> involved the appellant, Farah

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<sup>119</sup> Ibid.

<sup>120</sup> Griggs, above n 114, 86.

<sup>121</sup> Jonathan Moore, 'Equity, Restitution and in personam claims under the Torrens system' (1998) 72 *Australian Law Journal* 258, 260; Jonathan Moore, 'Equity, Restitution and in personam claims under the Torrens system: part II' (1999) 73 *Australian Law Journal* 712.

<sup>122</sup> (2007) 230 CLR 89.

<sup>123</sup> Lynden Griggs, 'In Personam: *Barnes v Addy* and the High Court's deliberations in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*' (2008) 15 *Australian Property Law Journal* 268.

Constructions, entering into commercial negotiations with the respondent, Say-Dee Pty Ltd, for the development of certain properties in Sydney. The respondent was to provide the financing for the joint venture, and the appellant was to undertake the project management. Farah Constructions were informed by the council that the proposed development would not be approved in its current form, but if the development were altered so that it encompassed neighbouring properties, it might succeed through the planning and development process. The man behind Farah Constructions, Farah Elias, did not inform the respondent of this, and the neighbouring properties were then purchased by his wife and teenage daughters, or by companies controlled by him.<sup>124</sup> Whereas the New South Wales Court of Appeal held that the purchase by the family members and the title held by them was defeasible, even though these relatives lacked any knowledge of wrongdoing, the High Court vehemently disagreed.<sup>125</sup> While the New South Wales Court of Appeal allowed a claim of unjust enrichment to succeed, with this based on strict liability and in the absence of any fault by the defendants,<sup>126</sup> the High Court considered their reasoning erroneous, exaggerated or flawed.<sup>127</sup> Not surprisingly, given my doctrinal search for coherence in the Torrens system, I strongly endorsed the view of the High Court. Restitutionary claims made in the absence of any recognised legal or equitable cause of action should not be allowed to undermine the Torrens system.

[N]otions of what is fair or just must give way to the rule of ordered principle. To this end, the fundamental tenet of indefeasibility represents this rule. It is only from this genesis that the modifications and qualifications to the principle should be articulated and justified. To do otherwise, leaves the imprint of the Chancellor's foot on recognised doctrines and fundamental tenets of Property Law. If, contrary to the statements of the High Court in *Garcia*, it is accepted that the basis of the result of that case was not unconscionability but, policy motivated relief, the... result for the Torrens system of land registration is that this policy-motivated restitutionary relief affords a recognised cause of action that supports the personal equity necessary for an in personam claim.<sup>128</sup>

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<sup>124</sup> (2007) 230 CLR 89, [100].

<sup>125</sup> *Ibid* [99].

<sup>126</sup> *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309, [217], [232].

<sup>127</sup> (2007) 230 CLR 89, [99].

<sup>128</sup> Griggs, above n 114, 80-81.

This would only be acceptable and sustainable if the circumstances dictate that such a qualification to immediate indefeasibility was mandated. 'Any analysis of a case involving Torrens land, should start from the fundamental precepts of indefeasibility of title and the irrelevancy of notice... [the courts must] also indicate that [any modification] is an isolated departure from the House of Torrens and its foundations.'<sup>129</sup> In communicating this, I was suggesting that for doctrinal coherence to be maintained, we could not undermine its operation by giving way to a subjective and arbitrary notion of fairness, which would sit uncomfortably and be irreconcilable with the principles of title by registration. In *Farah Constructions*, the High Court supported this view.

#### 2.4 Operating outside of the Register - The Continuing Resonance of In Personam

In 2003, I connected the role of unregistered interests in land with the in personam action to query how doctrinal coherence might be maintained through an analysis of how claims of mistake could be used to undermine the indefeasibility trump card of Torrens.<sup>130</sup> Within this paper, I was to articulate a concept of the Torrens system that is oft forgotten. This is, that the non-derivative nature of land ownership under Torrens involves a surrender of title from the vendor back to the Crown, with the purchaser of an indefeasible interest then gaining a new grant of title under the feudal system of land ownership that exists in respect of private land ownership in Australia.<sup>131</sup> Once this theoretical underpinning is accepted, and it cannot be challenged in my view, 'clear guidelines need to be drawn so that in cases of genuine mistake, some fair and equitable remedy is imposed ... restitutionary relief based on a concept of unjust enrichment would embody Torrens with a termite like cancer to its woodwork.'<sup>132</sup> This led to consideration of a number of decisions predominantly with a contract focus, with these decisions exploring and highlighting how the Torrens system of land registration could lead to unprincipled outcomes.

My research methodology began with consideration of an old New Zealand case: *Jonas v Jonas*.<sup>133</sup> In this 19th century decision, the vendor had agreed to sell to B and

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<sup>129</sup> Ibid.

<sup>130</sup> Lynden Griggs, 'Indefeasibility and mistake – the utilitarianism of Torrens' (2003) *Australian Property Law Journal* 108.

<sup>131</sup> Ibid 109.

<sup>132</sup> Ibid 119.

<sup>133</sup> (1883) LR 2 SC 15 (NZ).

C separate parcels of land. By mistake, B received the title to land intended for C and C received that which was intended for B. In an action by B to rectify the mistake, the courts held that as C had not been fraudulent in the acquisition of its interest and without privity existing between B and C, the continued possession of C was not improper, and equity could not be used to undermine the land title that was registered.<sup>134</sup> The primacy of the register was paramount, even though intuitively one might have thought that this would have founded a cause of action in mistake to correct. Illustrations that are more modern seem to allow the doctrine of mistake to override the photo created from the image on the register; with this undermining the public trust and reliance that one can have in looking at the mirror. For example, in *Lukacs v Wood*<sup>135</sup> the intent of the vendors was to transfer three vacant parcels of land to the defendant. There was a misdescription in the contract that saw the defendant receive title to two vacant blocks of land, plus a third title, on which was built an apartment dwelling. It was some two years post-settlement that the mistake was realised. The vendors sought to correct the mistake, and the defendant responded that indefeasibility of title allowed him to retain title to the land on which the apartments stood. The Supreme Court of South Australia held in favour of the vendors.<sup>136</sup> There was a mistake in the conveyancing process, a total failure of consideration and this rendered the contract void. The court made orders that reflected the original intent of the parties. Consider also *Tutt v Doyle*.<sup>137</sup> Because of a mistake in the transfer process, Tutt received a block of land larger than what was intended. He was aware that a mistake had been made. The New South Wales Court of Appeal saw the question quite simply — was it unconscionable for one party to take advantage of another's mistake.<sup>138</sup> The answer was yes. In terms of the coherence of the Torrens system, Chambers suggested that this case did no damage to the goals of title by registration.<sup>139</sup> As the person had notice of the mistake, even if this was constructive notice, restitutionary relief could be had.<sup>140</sup> My view was that the answer was not as clear as

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<sup>134</sup> See the comment by LL Stephens, 'The in personam exceptions to the principles of indefeasibility' [1969] 1 *Auckland University Law Review* 29, 32-33.

<sup>135</sup> (1978) 19 SASR 520.

<sup>136</sup> Ibid 531.

<sup>137</sup> (1997) 42 NSWLR 10.

<sup>138</sup> Ibid 12.

<sup>139</sup> See also, Kelvin Low, 'The Nature of Torrens Indefeasibility: Understanding the Limits of Personal Equities' (2009) 33(1) *Melbourne University Law Review* 205.

<sup>140</sup> Robert Chambers, 'Indefeasible Title as a Bar to a Claim for Restitution' [1998] *Restitution Law Review* 126.

this. Title by registration was intended to wipe the slate clean, to purge past errors and to provide certainty and simplicity around land ownership. This is not possible if the register is not the mirror we seek, and while slavish adherence to this concept can lead to unfair and unjust outcomes, we should be mindful of the words of Hepburn:

The ambiguous and pejorative nature of equity does not fit easily into a statutory structure centred [on] the guarantee of land title upon registration. Indefeasibility of title upon registration necessitates a level of certainty and determination [that] is, in many ways, directly oppositional to the approach taken by the equitable principles of fairness.<sup>141</sup>

These cases can be contrasted with *Tanzone Pty Ltd v Westpac Banking Corp.*<sup>142</sup> The original agreement between the lessors and the tenant contained a rent review clause which had an unintended and undesired effect. Essentially, the review clause would see rent escalating significantly beyond what was the original intent of the parties. Normally rectification would have been available. What complicated this matter was that the original lessor had subsequently sold to a new owner who, upon registration of his interest, sought to rely upon the terms of the registered lease agreement and the indefeasibility that this would provide. Despite his knowledge that the lease agreement did not reflect the true intent of the parties, the equity of rectification was no longer available.<sup>143</sup> The extent to which these decisions need to be accommodated within a title by registration framework draws differing responses. For example, Chambers argues that to exclude restitution type claims from the doctrine of indefeasibility places significant pressure on the courts and the common law to expand the fraud exception to indefeasibility in such a way that coherence can only be maintained artificially.<sup>144</sup> Hughson, Neave and O'Connor, though not specifically considering restitution in its modern form, look towards the in personam exception and suggest that this must by necessity be restricted under a title by registration system to those scenarios where the registered proprietor has acted in such a way that their personal conduct undermines the true state of affairs.<sup>145</sup> My view is in line with that of Brooking JA in

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<sup>141</sup> Samantha Hepburn, 'Concepts of Equity and Indefeasibility in the Torrens Systems of Land Registration' (1995) 3 *Australian Property Law Journal* 41.

<sup>142</sup> (1999) 9 BPR 17, 287.

<sup>143</sup> Ibid [52].

<sup>144</sup> See Chambers, above n 140.

<sup>145</sup> See the discussion of these viewpoints in Griggs, above n 130, 116-117.

*Russo v Bendigo Bank and Reichman*.<sup>146</sup> His Honour noted the need to be careful about applying the dishonesty rules as laid down in the Courts of Equity given that one of the foundational reasons Sir Robert Torrens introduced indefeasibility of title was to 'overcome the use of sophisticated equitable principles to hold up and defeat claims to title.'<sup>147</sup> Accordingly, I favour caution in allowing either an extended view of statutory fraud or an expanded role for *in personam* as a means to promote outcomes that undermine the principles of title by registration, and thereby destroy the coherence of concept and of principle that should be sought.

## 2.5 Returning to the Link between Unregistered Interests and Caveats

In 2010, I returned to explore the role of caveats in protecting the equitable or the unregistered interest.<sup>148</sup> By 2010, it was clear that doctrinally, the caveat was increasing in practical importance as the mechanism to support the unregistered or unregistrable interest, with the matter coming to a head in the critically important decision of the High Court in the previously mentioned *Black v Garnock*.<sup>149</sup>

[W]ith an appreciation that equitable interests have prospered, rather than fallen into disuse, the time for Equity and Torrens to find some form of homology had arrived. Perhaps *Black v Garnock* is the beginning of this, the failure to caveat arguably now elevated to the stature of professional negligence... With caveats for the most part, operating as the singular mechanism to warn of the presence of an unregistered interest, the line of authority, suggesting that the function of the caveat is *only* to protect the interest holder, must now come into question. Contemporary thinking may well see the purpose of a caveat as a means to prevent dealing with the land by the registered proprietor in a manner that is inconsistent with the rights of the caveator.<sup>150</sup>

In this case, which divided the opinions of the judges sitting in the superior courts, Black had obtained a judgement against the registered proprietor. The registered proprietor then entered into a contract to sell the land to Garnock for \$1 million. On the

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<sup>146</sup> [1999] 3 VR 376.

<sup>147</sup> Ibid [41].

<sup>148</sup> Lynden Griggs, 'Curial Discretion in the Drafting of the Caveats: Is it Preserving the Integrity of the Register' (2010) 21 *Bond Law Review* 68.

<sup>149</sup> (2007) 230 CLR 438.

<sup>150</sup> Griggs, above n 148, 80.

day of settlement, solicitors for Garnock searched title only to find encumbrances known to them. Some 20 minutes later they received a phone call from Black's solicitors indicating that they intended to prevent the sale going ahead. Some two hours later, Black's solicitors lodged a writ of execution on the title. Settlement took place later in the day, but Garnock was subsequently unable to register title, given the existence of the writ of execution. The issue before the New South Wales Court of Appeal and subsequently the High Court, was whether the equitable interest created first in time, pursuant to the contract of sale between Garnock and the registered proprietor, prevailed over the later interest, the writ of execution lodged with notice and knowledge of Garnock's interest. Both courts were divided by a slim majority. The minority in the New South Wales Court of Appeal and the majority in the High Court were clear that the registered interest prevailed. Callinan J expressed the view that caveats should be given a renewed primacy in protecting the unregistered interest, with this allowing the title to act as a mirror of the estates and interests that affect that parcel of land. Simply put, if Garnock had caveated their equitable interest established by the estate contract, the registration of the writ of execution would have been impeded; instead, they faced an inability to recover some or all of the value of their purchase. Justice Callinan, in addressing the failure to caveat, and whether it would be subversive of title by registration to mandate that caveating occur, commented:

What is much more likely to be subversive of the whole of the scheme of the Torrens system is that a person interested in, or entitled to deal with, land, who has not acted fraudulently, might suddenly and unexpectedly be saddled with, or postponed to, an equitable estate or interest in land which could have been, but was not, made the subject of protection by prompt lodgement of an instrument or the filing of a caveat pending lodgement.<sup>151</sup>

## 2.6 Connecting the Earlier Work to the move to Electronic Conveyancing

My earlier work on the nature of equitable and unregistered interests has been complemented by more recent work with two articles co-authored in *The Conveyancer and Property Lawyer* (with myself as primary author),<sup>152</sup> which seek to support a

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<sup>151</sup> (2007) 230 CLR 438, [80].

<sup>152</sup> Griggs and Low, above n 97; Low and Griggs, above n 86.



doctrinally coherent view of the Torrens system, specifically as we engage with electronic conveyancing. While this issue has been a recent focus, my work from as early as 1999 supported a move towards e-conveyancing and to exploring the convenience offered for the sale of equities, and applying that to the sale of land. In quoting Birrell, I noted that:

The ghosts of the last century remain in [the] continued requirement of signed and witnessed paper instruments. The electronic conveyancing of the next century must address this issue. The answer may be found in an expanded concept of agency in which agents are authorised to complete the transaction on behalf of the parties. Perhaps authorised classes of customers should be responsible for updating the register. This solution would require a combining of the present separate roles of settlement and registration. The paperless transaction system of the Australian Stock Exchange may point the way.<sup>153</sup>

My reasoning for this begins from a view that immediate indefeasibility should be accepted as the key principle that supports the element of the mirror of title, and what my contemporary series of articles does is question how sustainable the system will look if identity fraud became a major concern, and is somehow facilitated by electronic conveyancing. This problem was highlighted by Matthews who considers it 'laughably simple'<sup>154</sup> the way frauds can occur in the Torrens system of land registration. If this view is correct, is the system sustainable if those frauds are easier to perpetrate in an electronic environment and did the paper-based system provide a measure of protection? In this context, it should be noted that estimates of fraud vary greatly, with some suggesting that the rate is no more than one mortgage fraud every 133,000 transactions and one title fraud per 350,000 dealings,<sup>155</sup> whereas others suggest that in Victoria in 2007, fraud was present in one in every 19,000 transactions.<sup>156</sup>

The intended move to an electronic business environment for conveyancing represents the most significant change in industry practices over the last 150

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<sup>153</sup> Lynden Griggs, 'Possessory Titles in a System of Title by Registration' (1999) 21 *Adelaide Law Review* 157, 168.

<sup>154</sup> Paul Matthews, 'Registered Land, fraud and human rights' (2008) 124 *Law Quarterly Review* 351, 351.

<sup>155</sup> NECDL's Client Identify Verification Solution, (Presentation to the Law Institute of Victoria, Melbourne, 25 February 2011).

<sup>156</sup> See Law Council of Australia, *Uniformity of Property Laws and Procedures – Model Guidelines for a Harmonious System of Torrens Title* (23 June 2007) <<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/HarmoniousSystemofTorrensTitle.pdf>>.

years... The most significant change from the ... paper-based conveyancing instruments... is the shift from transacting parties signing the instruments necessary to effect changes in each jurisdiction's ... register, to an appointed agent signing on the transacting party's behalf. The signing, by a legal or conveyancing practice or practitioner, on the transacting party's behalf will necessarily require the *transacting party's identity to be verified*.<sup>157</sup>

My research methodology for the earlier articles was largely based on the analysis of the existing primary material, and reviewing that against the aims of title by registration. The more recent articles<sup>158</sup> went further than this, and looked beyond the primary sources to identify the key ingredients needed to establish a secure, trusted and accepted land registration system — ideas, which while applicable to title by registration are equally apposite to a deeds registration system. My focus became broader and in seeking to establish coherence sought support from the aims of land registration systems generally, and not just the jurisprudence of title by registration.

The first of these articles<sup>159</sup> opens by noting how verification of the identity of the parties to a land transaction not only stands as an obstacle to abuse but can greatly progress in establishing the public trust and security needed in the context of land transactions. In establishing a taxonomy of how identity fraud in land transactions is perpetrated it was considered that a failure to identify the appropriate safeguards will only undermine a system that has a huge input into the gross domestic product of the Australian economy. Land is a driver of economic activity, and commonly used as a tool by the government to achieve growth in consumer and investor spending through policy measures such as first home buyers schemes, negative gearing, the exception of the family home from many of the social security tests, and encouragement of the residential building sector. This article, in addition to the doctrinal analysis needed to establish the taxonomy associated with frauds, also introduced economic thinking into the justification of the response that was given. The economics required us to consider, in cases of identity theft or forged credentials, who should bear that loss; the homeowner, the financial institution, or the government?

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<sup>157</sup> Griggs and Low, above n 97, 286, quoting from, *NECS Request for Tender, CIV Standard and Application Procedures Development for NECS*, 22 January 2010, 2.8-2.9.

<sup>158</sup> Griggs and Low, above n 97; Low and Griggs, above n 86.

<sup>159</sup> Griggs and Low, above n 97, 285.

In addressing this, the methodology asked how loss should be spread, how could it be reduced and where should it be imposed? Our critique of these three elements established that in the majority of instances, the mortgagee should have the responsibility for verifying identity and for minimising the risk of loss.<sup>160</sup> For the individual consumer, identity theft and loss of land will be devastating; for the mortgagee and key stakeholder such as a conveyancing agent, less so. The reason for this is that the fee simple title-holder is not merely losing an asset of a certain financial value, but potentially their home as well. The mortgagee interest, by contrast, can be compensated by financial measures alone and a bank will more likely have the opportunity and resources to exercise enforcement mechanisms against wrongdoers. Whereas *Frazer v Walker*<sup>161</sup> saw no difference between the individual purchaser and the mortgagee in terms of the indefeasibility provisions of the legislation under examination, for many in the community, first preference should be given to financially compensating the party whose interest can most easily be met by an assurance fund payout (and this is the mortgagee). Some suggest that the party with fewer resources, presumably the landowner, will value the land more highly and distributive fairness would suggest that this party is given the opportunity to retain the land before the more financially advantaged entity.<sup>162</sup> Given this evaluation, we then asked precisely what burdens should be imposed on the mortgagee, and what steps Parliament should take in mandating obligations on financial institutions to ensure the coherence, consistency, and public trust of title by registration.

Connected to the thesis of this article is a requirement that [the] certifier or the subscriber under the national electronic conveyancing protocols undertake and maintain adequate records of client identification with this mandated by land registry offices. The goals of this are obvious:

- ensuring the public has confidence in the system;
- maintenance of the integrity of the land registration system;
- achieving highest practical and functional accuracy within the Register;

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<sup>160</sup> Low and Griggs, above n 86.

<sup>161</sup> [1967] 1 AC 569.

<sup>162</sup> Cooper, above n 12, 129.

- ensuring that the electronic system is efficient, viable, attractive and cost-effective when compared with paper processes; and
- being cost neutral in terms of potential liability upon the assurance funds.<sup>163</sup>

These specific points reflected my body of work over the last two decades and the value of this work is evident in the discussions and evolution of the electronic conveyancing protocols. If the Torrens system is to be coherent it must recognise the popular land interests held by the community; it must have the trust of the public, and the register must give an accurate reflection of the interests that pertain to that parcel of land. If we can answer yes to those questions, then the answer to my overarching research question is that the law as interpreted, and as supported by legislative principles, does achieve consistency and coherence with the ideas that bind title by registration. My view was that the changes that we have seen in Australia through recent legislative initiatives to impose greater obligations to verify identity on mortgagees, (such as the New South Wales *Real Property and Conveyancing Legislation Amendment Act 2009*, the Queensland provisions (ss 11A and 11B of the *Land Title Act 1994*), the Victorian changes (ss 87A and 87B of the *Transfer of Land Act 1958*) and the South Australian section (s 273A of the *Real Property Act 1886*)), have enhanced the operation and public confidence in the system. In addition, improved security measures within certificates of titles where those remain in hard copy, such as watermarks, holographic images, and embedded codes, all serve to broker public confidence and reduce the incidence of fraud. When these elements are put together, and attached to a rigorous verification of identity standard contained within the Model Participation Rules of the National Conveyancing protocols (discussed below), we can see that the coherence of the Torrens system can be maintained despite the opportunities for fraud possible within an electronic environment.

The second of these articles in *The Conveyancer and Property Lawyer* begins by examining how a modern land fraud may be constructed. For example, the Perrin fraud involved the husband forging his wife's signature on mortgages in respect of property owned by the wife. In June 2008, the Commonwealth bank had lent Mathew Perrin

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<sup>163</sup> Griggs and Low, above n 97, 301.

some \$10 million, with this loan later increased by another \$3.5 million. When default occurred, the bank sought to recover under the relevant documents. Mrs Perrin denied ever signing the mortgages, alleging that her signature was forged. What enabled this fraud to occur is that the Commonwealth Bank at no stage directly spoke to or dealt with Mrs Perrin. The security documents including the mortgages were left with her then husband and there had been no contact between the bank and Mrs Perrin. The bank ultimately accepted that Mrs Perrin was not liable<sup>164</sup> as it had failed to comply with its obligation to verify identity. Having not done this, the bank could not rely on the indefeasibility given to it by the act of registration.

The second scenario involved the theft of identity and perhaps is more concerning in an era of electronic conveyancing and a global marketplace. A Mr Mildenhall was the registered owner of two unencumbered investment properties in Western Australia. While Mildenhall was overseas, one of his investment properties was sold without his knowledge. He only found out about this when the neighbour to one of the properties rang him and told him that it had been sold. It appeared that the fraud had been perpetrated by unknown individuals intercepting Mildenhall's mail, and then with the knowledge gained from this interception, falsifying a number of documents including the authority to sell the property. A real estate agency was then duped to put the property on the market, with the property subsequently sold and the proceeds then transferred to a bank in China, from which they disappeared. The verification of the identity of Mr Mildenhall was similarly forged. When this matter gained notoriety in Western Australia, a number of other similar identity thefts and sale of properties became public knowledge, with the modus operandi extending outside of Western Australia.<sup>165</sup> Given this contemporary potential for identity theft, email interception, and computer hacking, a coherent land administration system must serve the public interest and meet community expectation, and in doing this the system must be trusted. How we achieve this lies in the application of a stronger identity verification standard imposed on those who gain the benefit of title by registration. Title by registration provides a framework and an incentive for registration, and imposes more onerous obligations on key stakeholders within the conveyancing process, such as mortgagees

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<sup>164</sup> *Commonwealth Bank of Australia v Perrin* [2011] QSC 274.

<sup>165</sup> A very similar matter was recently resolved in the Australian Capital Territory:  
<<http://www.canberratimes.com.au/act-news/act-government-to-pay-canberra-property-scam-victim-more-than-540000-20160822-gqy4a1.html>?>

and conveyancing agents. 'If one is to receive the advantages of the register title system, the corresponding obligations to share the burden should be imposed.'<sup>166</sup>

[T]he authors first recommendation is that identity verification requirements should have at its core a requirement for face-to-face identity verification. The history of dealings and past relationships between customers should not, under any circumstances obviate the need to have independent face-to-face verification of what is occurring. [Where] face-to-face verification is not physically possible ... simple measures to counteract this inability are available as highlighted by recent changes to witnessing requirements.<sup>167</sup>

The importance of these points and the value of my work are evidenced by the legislative changes noted above, and the Model Operating Rules and the Model Participation Rules<sup>168</sup> for the electronic conveyancing system<sup>169</sup> incorporating strict verification of identity requirements. For example, schedule eight of the Participation Rules imports measures in excess of the well-known 100-point identity check required to open a bank account. A subscriber to the system must verify the identity of each client that the subscriber intends to represent. Unlike opening a bank account, a face-to-face interview is required with the subscriber needing to be satisfied that the person before them and the photographic ID that must accompany this interview represent the same person. The subscribers, such as solicitors, are required to have the visual skills to determine that the shape of the nose, eyes, mouth and cheekbones match the person shown in the photograph.<sup>170</sup> The Participation Rules establish a hierarchical level of document production with it necessary to show that the previous and better level is unavailable before proceeding to the next and weaker construct. For example, category one is the starting point and requires an Australian passport plus an Australian driver's licence or proof of age card plus a change of name or marriage certificate if necessary. Category two, for the person who does not drive, requires a passport, plus birth or citizenship certificate, plus Medicare or Centrelink details, and

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<sup>166</sup> Low and Griggs, above n 86, 378. For a discussion of the role that the existence of a paper based certificate of title can act as an obstacle to fraud, see Celia Hammond, 'The Abolition of the Duplicate Certificate of Title and its Potential Effect on Fraudulent Claims Over Torrens Land' (2000) 8 *Australian Property Law Journal* 115.

<sup>167</sup> Low and Griggs, above n 86, 377.

<sup>168</sup> See, Australian Registrars' National Electronic Conveyancing Council (ARNECC) (2016) <[www.arnecc.gov.au](http://www.arnecc.gov.au)>.

<sup>169</sup> See Property Exchange Australia <[www.pexa.com.au](http://www.pexa.com.au)>.

<sup>170</sup> ARNECC, *Model Participation Rules* (3<sup>rd</sup> ed, January 2015), cl 2.2 of Sch 8.

change of name information if required. Category three, for the person without a passport, provides that the person must show an Australian driver's licence or proof of age card plus birth certificate plus Medicare or Centrelink card, plus change of name or marriage certificate if necessary. For the Australian citizen without photo ID, category four requires that the subscriber uses an Identifier Declaration to verify identity. This requires that both the person being identified and the identity declarant be present together for a face-to-face interview. The declarant must be an adult, have known the person being verified for at least 12 months, not be a relative nor a party to the transaction, and in a category of occupation such as Bank Manager, Community Leader, Legal Practitioner, Doctor, Public Servant or Police Officer. Category four cannot be used for verification of identity in a foreign country, which mandates the use of the first three categories, with verification required by an Australian Consular Officer, or Australian Diplomatic Officer, or where the person being verified is a member of the Australian Defence Force, a Competent Officer.<sup>171</sup>

Recently, in the *New Zealand Law Review*,<sup>172</sup> I, along with my co-authors, have expanded on this concept of verification of identity as one of the key proof requirements for any sustainable land registration system. We argued that in addition to verification of identity there was a need to connect that verified identity to the ownership of the land, and then to ensure that the owner of that land has the entitlement to deal with that land. In gaining the trust of the community and in securing the operation of the Torrens system, our concerns were that the focus of the policy makers was too narrowly drawn towards verification of identity, with the consequential risk that insufficient attention was being paid to whether that person had the right to deal with that particular parcel of land.

## 2.7 Has Electronic Conveyancing made Immediate Indefeasibility Vulnerable?

The strands of indefeasibility, legislative evolution, and case law development were all brought together in 2011 when I, as the primary author, asked the question as to whether immediate indefeasibility was under threat.<sup>173</sup> Against a backdrop of rising

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<sup>171</sup> Ibid.

<sup>172</sup> Thomas, Low and Griggs, above n 108.

<sup>173</sup> Low and Griggs, above n 49.

fraud, with some 21% of fraud found to involve mortgages,<sup>174</sup> and legislative and case law intrusions into the doctrine,<sup>175</sup> I, along with my co-author, started with the recognition that the principle of indefeasibility was to form the bedrock of title by registration. With research methodology tracing the case law developments and distilling the context in which those matters occurred; reflecting on the previously mentioned legislative impositions; and isolating the reasons for law reform proposals (such as that in New Zealand where it has been suggested that immediate indefeasibility be qualified by judicial discretion to override in matters of manifest injustice)<sup>176</sup> we concluded that these measures do not weaken immediate indefeasibility. What these measures provide is a set of safeguards that operate in the contemporary environment of global deregulation. If anything, what they conclusively show is the need for the Australian federation to work cooperatively and collectively to achieve one legislative code for the Torrens system, a matter that would neatly align with the introduction of national protocols for the conveyancing agents and the financial institutions operating under PEXA. Our view was that security systems within title by registration, particularly in an electronic environment needed to encompass three aspects:

- i) Something you have (such as a certificate of title);
- ii) Something you know (such as a PIN); and
- iii) Something you are (biometric capabilities).<sup>177</sup>

My research into the doctrinal coherence of title by registration continues to have contemporary relevance and makes an original and unique contribution to shaping the thinking around this system of land registration. Specifically, this has occurred in my endorsement and promotion of indefeasibility as the principle by which we can meet the requirements of a certain, stable, and trusted land system. The idea of a mirror and the importance of the register coheres with the principle of indefeasibility. As electronic

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<sup>174</sup> Paul Watkins, *Fraud in Conveyancing*, (Paper presented at the Institute of Conveyancers, 2007 National Conference, March 2007) quoting from Russel G Smith, 'Serious Fraud in Australia and New Zealand' (Research and Public Policy Series No. 48, Australian Institute of Criminology and PriceWaterhouseCoopers, 2003) cited in New Zealand Law Commission, *A New Land Transfer Act* (June 2010) n 33.

<sup>175</sup> Low and Griggs, above n 49, 224.

<sup>176</sup> It is possible to compare indefeasibility with how registration works in the United Kingdom. In that jurisdiction, where there is no concept of indefeasibility, but title was intended to provide stability and certainty to land registration, the recent cases have suggested quite the reverse — that title registration provides scant evidence of security or certainty. See the discussion by Carruthers, above n 85.

<sup>177</sup> Low and Griggs, above n 49, 229.



conveyancing, at least in process, begins to embed, the next decade will provide the jurisprudence that surrounds this practice. In theory, the jurisprudence should not have to alter, but in operational terms, it is likely that new problems will emerge, perhaps demanding new solutions. The consequences that flow from my work in developing new insights into the connection and coherence between the substantive legal principles and the core ideals of the Torrens system has, I suggest, made an enduring and original contribution to the doctrinal knowledge in this area. Evidence of this can be seen in the citation of my work in a number of leading journals<sup>178</sup> monographs, (some published internationally)<sup>179</sup> and law reform papers (both domestic and abroad).<sup>180</sup>

What I have suggested is that provided we keep in mind the goals of a successful land registration system (that it provide for the majority of tenurial interests, that in its use it be trusted, and that there be security regarding the interests held), and we connect these goals with the elements of the mirror, curtain and indemnity, then electronic conveyancing can move us closer to the ideas and principles that underpin the utopian ideal of Sir Robert Torrens.<sup>181</sup> Allied to this idea is my most recent work that has sought to explore how indefeasibility, which presently provides no guarantee of land boundaries, could be extended to give that guarantee.<sup>182</sup> The surveying profession is currently transitioning to a digital datum where GPS/GNSS technology is used to provide accurate coordinates of the boundaries of land.<sup>183</sup> If the title to land was to incorporate a plan of the dimensions of land, and commonly there is a descriptive plan

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<sup>178</sup> Such as Hang Wu, 'Beyond the Torrens Mirror: A framework of the in personam exception to indefeasibility' (2008) 32(2) *Melbourne University Law Review* 672; Fiona Burns, 'Adverse Possession and Title by Registration Systems in Australia and England' (2011) 35(3) *Melbourne University Law Review* 773; Lyria Bennett Moses and Brendan Edgeworth, 'Taking it Personally: Ebb and Flow in the Torrens System's In Personam Exception to Indefeasibility' (2013) 35(1) *Sydney Law Review* 107.

<sup>179</sup> Arruñada, above n 34, 251, 269; David Cowan, Lorna Fox O'Mahony and Neil Cobb, *Great Debates in Land Law* (Palgrave MacMillan, 2016) 130, fn 83; Martin Dixon (ed), *Modern Studies in Property Law* (Bloomsburg, 2009) vol 5, 43, fn 31; James Alm, Patricia Annez, Arbind Modi, *Stamp Duties in Indian States* (the World Bank, 2004) 3 fn 8; Elise Bant and Mathew Harding, *Exploring Private Law* (Cambridge University Press, 2010) 452; Gabriel Brennan, *The Impact of E-conveyancing on Title Registration: A Risk Assessment* (Springer, 2014) 313.

<sup>180</sup> New Zealand Law Commission, *Review of the Land Transfer Act 1952*, Issues Paper No 10 (2008); Tasmanian Law Reform Institute, *The Law of Easements in Tasmania*, Final Report No 12 (2010); Victorian Law Reform Commission, *Easements and Covenants*, Final Report No 22 (2010).

<sup>181</sup> With this succinctly summarised as removing the 'dependent nature of [land] titles', Torrens, above n 6, 8.

<sup>182</sup> Lynden Griggs, 'Developing the Ultimate Cadastre – Indefeasibility and Boundaries' (2016) 5 *Property Law Review* 149.

<sup>183</sup> For the future directions of surveying and its wish to align itself with the substantive principles of land law, see the work of the Intergovernmental Committee on Surveying and Mapping, which in producing Cadastre 2034: <<http://www.icsm.gov.au/cadastral/Cadastre2034.pdf>> establishes a vision for the interconnectedness of surveying and law and a timeline for completion of that vision. Importantly (at 6), they speak of the need for a cadastral system that is fully integrated with the broader legal and social interests in land.

attached, and legislation was altered so that misdescription of boundaries was no longer an exception to indefeasibility, then the concept of indefeasibility could be used to support the land boundaries as shown on the certificate of title, provided those boundaries would, in the vast majority of instances, be accurate. In essence, indefeasibility can serve as the legal tool to provide enhanced stability and certainty around land ownership. In this sense, the development would respond to the concerns of the community who would, one suspects, be surprised that while land systems guarantee the estate or interest that one has, it does not guarantee the physical boundaries.

My work to achieve doctrinal coherence is also reflected in my original research undertaken for the textbook, *Principles of Property Law*,<sup>184</sup> and my recent contributions to the new edition of *Australian Real Property Law* and *Australian Property Law, Cases and Materials*.<sup>185</sup> In both texts I was required to structure the doctrinal learning in such a way as to make it digestible and accessible to the reader (my work for *Principles* was original for the two relevant Torrens chapters (indefeasibility, and priorities), whereas for *Australian Real Property Law*, I am updating the work of previous authors (including the key Torrens chapters). The *Principles* text, which was for the student market, required me to distil and synthesise the relevant principles in a way that was manageable and bite sized for the contemporary student. In addition, I was required to apply the doctrinal learning in such a way as to make it applicable to problem-solving scenarios and to explain how the elements of title by registration coherently fit into a secure and trusted land registration system. *Australian Real Property Law*, which has both a student and practitioner market, and which comprehensively sets out the legislation and applicable case law for the Australian states and territories, requires extensive updating for each edition, and, specifically for the 2015 edition, significant amendments in light of the move to electronic conveyancing and the changes to legislation that this necessitated.

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<sup>184</sup> Rohan Price and Lynden Griggs, *Property Law in Principle* (Thomson Reuters, 2005, with 2<sup>nd</sup> ed in 2008).

<sup>185</sup> Anthony Moore, Scott Grattan and Lynden Griggs, *Bradbrook, MacCallum and Moore's Australian Real Property Law* (Thomson Reuters, 6<sup>th</sup> ed, 2016); Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Property Law, Cases and Materials* (Thomson Reuters, 5<sup>th</sup> ed, 2016).

## 2.8 Possessory Interests and Title by Registration

While doctrinal analysis is ultimately about what the law is, it does highlight the inconsistencies within the law and exposes areas where clarity is needed. In one sense, legal scholarship could always be described as law reform. It seeks to advance or progress the law and ensure that it is better suited to the circumstances and context in which it sits. As a specific subset of doctrinal coherence, I have consistently argued that the presence of possessory-based doctrines has no role in a contemporary Torrens system and that the law should be altered to reflect this. For example, in a 1999 article in the *Adelaide Law Review*<sup>186</sup> I suggested that possessory titles have no role given the key ingredient of indefeasibility is obtained through registration, rather than through possession. '[In] an age of electronic conveyancing, with the greater role and increased capabilities of the register, should not possessory titles be rendered obsolete? The initial response to these questions is yes.'<sup>187</sup>

A coherent system must adhere to its underlying foundation — registration, rather than possession, embodies the core. As I noted, '[t]he criticisms of the adverse possession rule, its basis in a different historical context, its inconsistency with the notion of [title by registration], and the injustice it can produce, all amount to a persuasive argument that it should be abandoned.'<sup>188</sup> There is no doubt, however, and this was demonstrated by the Tasmanian Law Reform Commission report of 1995,<sup>189</sup> that for many of the key participants in the conveyancing process, most notably surveyors and conveyancing agents, possessory based doctrines provided a remedial device to quickly and easily remedy minor boundary disputes or encroachments. For example, in my home jurisdiction of Tasmania, and following the Supreme Court decision in *Woodward v Hazell*<sup>190</sup> there was a view taken that the principle of adverse possession should remain, but that there had to be a significant tightening and a statutory basis given to adverse possession. Today, the practical obstacles make it close to impossible to claim adverse possession in Tasmania, and there has not been a

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<sup>186</sup> Griggs, above n 153.

<sup>187</sup> Ibid 172.

<sup>188</sup> Ibid.

<sup>189</sup> Law Reform Commissioner of Tasmania, *Report on Adverse Possession and Other Possessory Claims to Land* (1995).

<sup>190</sup> Unreported, Supreme Court of Tasmania, 17 March 1994.

successful contested adverse possession claim since the legislation was enacted.<sup>191</sup> As the new millennium dawned, my view<sup>192</sup> was clear:

In the 140 or so years since its introduction, the concept of possessory title (so very important to the English notion of seisin) has continued to play a part in weakening, or modifying, the principles of title by registration devised by Sir Robert Torrens. As we approach the new century, it is timely to reflect on those ideals of reliability, simplicity, low cost, speed and suitability and how the technology of today can finally fulfil the promise or expectation of 140 years ago. To this end, possessory titles have no role to play. To allow them to remain only retains the conceptual confusion between a land system based on possession and one based on registration. ... Electronic conveyancing raises the potential importance of the register, to a level not presently seen. Critically, the substantive law behind this development must reflect the expectations of the general community at the start of the 21<sup>st</sup> century. ... In contemporary Australian society, adverse possession should be relegated to historical irrelevance.<sup>193</sup>

It is a topic to which I return some five years later,<sup>194</sup> though rather than look at the creation of land interests by way of possession; I considered the doctrine of abandonment. Could easements could lose their recognition through non-use despite their continued presence on the register? My strong view was that abandonment of easements through the absence of use should not be allowed if the register is clear that the incorporeal hereditament remains on title. In exploring the recent decisions in this area, I also asked why the courts should think it relevant to consider the interests of predecessors in title in determining whether abandonment has occurred, given that coherence of title by registration is built on the idea that with each new transaction, a

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<sup>191</sup> See Part IXB *Land Titles Act 1980*. One particular troublesome aspect of the legislation is that the payment of rates by or on behalf of the owner is seen as a barrier to a claim (s 138U). However, and while it hasn't been litigated as yet, there is confusion as to what the payment of rates relates too — the view of the land from the adjoining street, or, and remembering that Torrens title does not guarantee land boundaries in Australia, the land as represented on the title, and associated planning documents.

<sup>192</sup> Indeed, in some jurisdictions, for example Queensland, the availability of adverse possession was a subsequent amendment to the original Torrens statutes. See the discussion of the history behind the Queensland legislation in W N Harrison, 'Title by Adverse Possession' (1951) 1 *University of Queensland Law Journal* (Pt 3) 7. The author noted (at 7) that at the time of writing (1951), Queensland was the only state that did not allow a claim by adverse possession. The *Real Property Amendment Acts 1952* (Qld) brought Queensland into line with the other states.

<sup>193</sup> Griggs, above n 153, 174-175.

<sup>194</sup> Lynden Griggs, 'The common law abandonment of easements on Torrens land – can it be done, and, if so, should the intent of predecessors in title be taken into account' (2007) 14 *Australian Property Law Journal* 162.

new title is issued. In support of this argument, I relied upon an interdisciplinary analysis involving economics, consumer paradigms, and finally a view that the dynamic security<sup>195</sup> associated with title by registration should be endorsed.<sup>196</sup> In writing on this issue, it was noted<sup>197</sup> that in New South Wales, Western Australia, and Tasmania, 20 years non-use would amount to proof that the easement has been abandoned. In Victoria, by contrast, 30 years non-use is required. Despite only temporal differences existing between the jurisdictions, very different approaches were evident between, for example, Victoria and New South Wales. In Victoria, it has been held that the easement remains enforceable while it remains on the certificate of title. In this jurisdiction, what amounts to common law abandonment will not suffice to counter the conclusive evidence given by the title. In New South Wales the contrary position was reached, indefeasibility will cede to the common law recognition that the easement has been abandoned. After an examination of the case law of these two jurisdictions, and then a consideration of the issue against the goals of title by registration, my view was that the purchaser of a dominant tenement with an easement noted on the title should be able to rely on that easement whilst it remains on the register.

The significance of this work is evident as the article was the impetus for a major law reform report on the topic of easements by the Tasmanian Law Reform Institute, where I was co-author of the Final Report.<sup>198</sup> This report recommended, amongst other things, that the common law requirements for the abandonment of easements should be codified, that educational material concerning abandonment of easements be produced, and that successive non-use by the owners of the dominant tenement be a factor in considering whether the easement has been abandoned. To date, the government has not legislated to take up these recommendations, though possessory and prescriptive interests remain exclusively within the domain of legislation in Tasmania,<sup>199</sup> and are extraordinarily difficult to establish. As Burns<sup>200</sup> notes, success

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<sup>195</sup> For a discussion of static and dynamic security, see Pamela O'Connor, 'Registration of Title in England and Australia: A Theoretical and Comparative Analysis' in Elizabeth Cooke (ed), *Modern Studies in Property Law*: (Hart Publishing, 2003) vol 2.

<sup>196</sup> Griggs, above n , 175.

<sup>197</sup> Ibid 164.

<sup>198</sup> Lynden Griggs, *Law of Easements in Tasmania: Issues Paper*, Tasmania Law Reform Institute, 13 (2009) (Consultants Report)/Final Report published subsequent to release of Issues Paper (Newitt and Griggs, *Law of Easements in Tasmania*, Tasmanian Law Reform Institute, Final Report, (2010) 12).

<sup>199</sup> Part IXB *Land Titles Act 1980* (Tas).

<sup>200</sup> Fiona Burns, 'The Future of Prescriptive Easements in Australia and England' (2007) 31(1) *Melbourne University Law Review* 3.

under the Tasmania legislation is slim at best given that if the servient owner objects, the application is brought to an end unless there is serious hardship, and in the absence of publicly accessible information as to what this means (presumably no other alternative), a person seeking to claim a prescriptive easement is unlikely to succeed.

Returning to the issue of adverse possession, I then considered whether a human rights prism would weaken my strongly held views about the relevance of possessory titles within Torrens. At its heart, this issue raises the question of whether to allow possessory titles to override a registered title, without compensation, involves a breach of the human right not to have property taken without compensation. Given the emerging human rights discourse in Australia, it is an issue that is likely to play out over the next decade. '[W]ith indefeasibility achieving either logical or perhaps legendary status within our Torrens register, and its foundation directly oppositional to possessory interests, how does the jurisprudence find that elusive balance?'<sup>201</sup>

The impetus for this discussion was the decision of the House of Lords in the United Kingdom and the decision of the Grand Chamber of the European Court of Human Rights in *JA Pye (Oxford) Ltd & Ors v Graham and Ors*.<sup>202</sup> The personal representatives of Graham claimed to be entitled to 25 hectares of registered land owned by the corporate plaintiff Pye. With there being no doubt that Graham had used the land without permission of the registered owner, the House of Lords, 'without enthusiasm'<sup>203</sup> found in favour of the applicant; the land was to pass to the trespasser without compensation payable to the registered owner. Given that the land was potentially worth up to £10 million, unsurprisingly Pye then took the state to the European Court of Human Rights, arguing that the legislation that permitted adverse possession to exist was in breach of its rights not to have its property taken without compensation. In the Chamber judgement, the majority of the European Court saw the matter as one of exceptional severity and Pye succeeded. Acquisition of property without compensation could only be permitted in exceptional circumstances, and as the law had been subsequently changed post this case, proof existed that the law of

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<sup>201</sup> Lynden Griggs, 'Possession, Indefeasibility and Human Rights' (2008) 8 *Queensland University of Technology Law Journal* 286, 298.

<sup>202</sup> [2002] 3 WLR 221 (House of Lords); [2005] EGLR 1 (Chamber Judgement, European Court of Human Rights); [2007] All ER (D) 177 (Grand Chamber, European Court of Human Rights).

<sup>203</sup> [2002] 3 WLR 221, [2].

adverse possession was unfair.<sup>204</sup> This did not end the matter however. The state then appealed to the Grand Chamber of the European Court of Human Rights. In a 10:7 decision, the state's appeal was upheld. The statutory provisions surrounding adverse possession that ultimately eliminated the title of Pye were not intended to deprive paper owners of title, but merely to regulate questions of title. This was not a question of deprivation. It was a question of control of use. 'Even in the case of registered land, it was open to the legislature to attach greater weight to the fact of possession rather than the act of registration.'<sup>205</sup>

I was critical of this use of human rights as a means to undermine title by registration. While it may be correct to say that ownership cannot be understood without reference to possession, it is also important to reflect that title by registration was designed to revolutionise the substantive principles of land law; it was a transformative change and not merely evolutionary. Title by registration brought us the concept of a non-derivative title reflected by the mirror and supported by the principle of indefeasibility. In addition, while there is no doubt that the resonance of possession is substantial: 'It speaks to third parties, the market, to the world, as to the state of affairs ... Its hold on the individual and collective psyche of Australian society is significant',<sup>206</sup> this should not be determinative.

[The] questions raised here will not be answered by mechanical formula, the application of economic theory, or by resort to historical reference. It is not about "protection or redistribution; it is the protection of whom and the distribution of what." It is this which must be answered, and with land being in "defined and limited supply", the answer that should be given, is a strong preference for the precepts, ideals and values provided within and by, the Torrens system of land registration.<sup>207</sup>

## 2.9 A Discourse into Interdisciplinary Analysis

As noted, I have sought to cement my arguments around the coherence of the Torrens system through the learning of other disciplines, particularly economics and to a lesser

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<sup>204</sup> Griggs, above n 201, 289-290.

<sup>205</sup> Ibid 291.

<sup>206</sup> Ibid 300.

<sup>207</sup> Ibid.

extent, consumerism. My conversation with economics and land registration began in 2001<sup>208</sup> and in so doing, I followed the lead of Sir Robert Torrens in using economics as a basis on which to support land registration. He stated with language that resonates with the economic idea that property should be put to its highest value use:

If, by the operation of law, these defects could be cured, or the capitalist be assured against deprivation of the wealth expended upon the land, the vacant blocks which now disfigure the rising streets would immediately become available as building sites, and the wealth of the community be increased by the value restored to them as such.<sup>209</sup>

In 2001, I argued that by engaging dynamic security with liability-based rules, title by registration was demonstrably superior to other forms of registration of land ownership. My analysis began from the premise that scarce resources should be put to their highest value use, and in moving items to their highest value use, the market, if operating effectively, will allocate resources in a way that will see a surplus produced beyond what would otherwise occur. This is particularly important in the context of title by registration that relies on a publicly funded register as well as public servants directly supported by the taxpayer. In looking at this in the digital context, I was seeking to answer whether economics supported the transformation from a system based on registration of deeds to creation of title by registration. The argument I make is that with the conveyancing costs associated with the transfer of general law land significantly higher than a corresponding transfer of Torrens land, we are justified in destroying the formal property rights that would otherwise exist at common law, and replace these property rights with rules for the allocation of liability and compensation.

Summarising this analysis, the transaction or bargaining costs with general law are so high (because of the need to undertake a set-period search to establish a good root of title) that the solution in Torrens to protect the registered owner and to compensate the innocent party who has lost their formal legal interest in the land...sees us adopting a liability based solution to this conundrum, rather than a property-based model. That is to say, we accept that the property interest is not paramount, that the right of the formal legal owner can be infringed, but that it is

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<sup>208</sup> Griggs, *Digital World*, above n 83.

<sup>209</sup> Torrens, above n 6, 26.



ultimately cheaper to allow that infringement and pay compensation (ie, accept the liability), rather than enforce the proprietary rights of the formal legal owner.<sup>210</sup>

In this same paper, I also recommended that additional safeguards be placed into electronic conveyancing, with options noted such as the digital signature, the importance of which can now be seen with security features now prevalent in the thinking of those enacting the national electronic conveyancing protocols.<sup>211</sup> My work to enhance the coherence of the title by registration system continues unabated and the one remaining overarching goal would be a national land register, a national Torrens code, combined with a national surveying code. At present what we have are state registers, state legislation, and state surveying codes. 'We are living in an environment of national markets and mutual recognition, yet we still operate eight varieties of the Torrens system. Australia is one country; we need one datum, one survey code, and one Land Register.'<sup>212</sup>

In 2002, I again used economics to query whether the assurance fund, a key component of title by registration (at least in Australia),<sup>213</sup> should be retained or whether individually we should be required to take out private title insurance when we are purchasing land. With the introduction of title insurance in Australia<sup>214</sup> and the rise of capped conveyancing insurance in New Zealand,<sup>215</sup> it is a topic of greater significance today. My methodology was to examine the initial reasons for the introduction of the assurance fund and then to examine the imposition of costs for the community as a whole as between a state-funded assurance model and private title insurance. Whereas Whalan considered that the fund may have been introduced as a

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<sup>210</sup> Griggs, *Digital World*, above n 83, [23].

<sup>211</sup> Ibid [36]-[37], with reference to the work of Dale A Whitman, 'Digital Recording of Real Estate Conveyances' (1999) 32 *John Marshall Law Review* 227, and Russel Cocks and John Barry, 'Electronic Conveyancing: Challenges for the Torrens System (2001) 8 *Australian Property Law Journal* 270.

<sup>212</sup> Griggs, *Digital World*, above n 83, [39], was quoting from S Birrell, J Barry, D Hall and J Parker, 'Is the Torrens System Suitable for the 21<sup>st</sup> Century' (Published in Proceedings of 1995 New Zealand/Australia Cadastral Conference, Wellington New Zealand) 5.

<sup>213</sup> Griggs, above n 29.

<sup>214</sup> For example, see First Title (2012) <<http://www.firsttitle.com.au/home>>.

<sup>215</sup> See for example the advent of capped conveyancing insurance in New Zealand: Auckland District Law Society Incorporated, "*Capped Conveyancing*" insurance – a new approach to managing risk in residential conveyancing (2015) <<http://www.adls.org.nz/for-the-profession/news-and-opinion/2015/7/3/%E2%80%99Capped-conveyancing%E2%80%9D-insurance-%E2%80%93-a-new-approach-to-managing-risk-in-residential-conveyancing/>>. I am a co-author, though not the primary author of an article that considers these developments: Lynden Griggs, Rouhshi Low and Rod Thomas, "The Changing Face of Conveyancing Responsibility" (2015) 5(2) *Property Law Review*, 109-112.

‘corresponding counterpart to indefeasible title’<sup>216</sup> other research suggests that it was to provide administrators with a shield from liability and to overcome legal hostility to the introduction of title by registration conveyancing,<sup>217</sup> something that would ultimately see solicitors lose their monopoly position.

Whatever may be the reasons for the assurance fund, in identifying the criteria against which of the two options (privately funded title insurance or an assurance fund) could be judged, the framework utilised was to ask three questions: <sup>218</sup> (i) what is the role of the market; (ii) who can most easily avoid the loss, and (iii) what is the low cost administrative option. In addressing these points, I was of the view that the assurance fund still provides a lower cost solution to the funding of the guarantee than the utilisation of private title insurance. ‘Arguably Australia’s best [intellectual] export, the Torrens system, still maintains its relevance in contemporary Australia. Importantly also, it can be explained and justified by a multitude of research methodologies — in this instance, economics/law.’<sup>219</sup>

Given the availability today of title insurance in Australia and New Zealand,<sup>220</sup> with this product providing purchasers of land an insurance hedge against many of the risks associated with ownership of property,<sup>221</sup> an examination of the relationship between it and assurance funds is both necessary and opportune. This work<sup>222</sup> has not questioned the viability of the assurance fund, but whether the marketing by title insurances companies, the zeal by which registrars protect the assurance fund, the difficulties in accessing the fund in a number of so-called last resort jurisdictions,<sup>223</sup> and the removal of the fund from liability where a person has contributed to the problem or where a conveyancing agent has appropriate indemnity insurance,<sup>224</sup> will promote financially strapped governments to absolve themselves from primary liability and seek to

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<sup>216</sup> Griggs, above n 29, 251.

<sup>217</sup> Ibid.

<sup>218</sup> Taken from the work of Tony Duggan, ‘Personal Property Security Interests and Third Party Disputes: Economic Considerations in Reforming the Law’ in Michael Gillooly (ed), *Securities over Personalty* (Federation Press, 1994) 234.

<sup>219</sup> Griggs, above n 29, 257.

<sup>220</sup> See *ibid.*

<sup>221</sup> Such as incorrect boundaries and illegal structures which are aspects not covered by the indefeasibility regime, as well as traditional claims that may be covered by a Torrens regime, for example loss of title to land through fraud.

<sup>222</sup> Griggs and Low, above n 32.

<sup>223</sup> For example, Tasmania is a last resort jurisdiction. A person who has lost title to land must proceed against the wrongdoer, or show that the wrongdoer has left the jurisdiction, or is bankrupt before claiming on the fund.

<sup>224</sup> An example of where these arguments were made can be seen in *Pedulla v Panetta* (2011) 16 BPR 30, 229.

promote a culture of self-reliance and self-insurance. If our primary consideration is the mortgage epidemic of today, it's worth noting however, that one of the prompts for Sir Robert Torrens was the land fraud of the mid-19<sup>th</sup> century.<sup>225</sup>

In undertaking this doctrinal analysis, consideration was directed to the decision of *Pedulla v Panetta*.<sup>226</sup> Pedulla sought compensation of \$3.8 million from the assurance fund for the loss of title to her land; land which had been fraudulently transferred by her brother, his partner, and a solicitor who was the former partner of the brother's current partner. What was intriguing about this decision was the manner in which the Registrar sought to argue that the compensation should be less, or the responsibility of another. First, there was the submission that the market value of the land, sold to innocent purchasers by the criminal activities of the brother was not \$3.8 million. Second, it was suggested that Pedulla may have been responsible through omission for what had happened, and finally, given that a solicitor assisted the fraud, it was thought that this person's professional indemnity cover would apply, rather than the state-based assurance fund. All three grounds were rejected. The market value of the land was the price paid by the purchasers and Pedulla had no reason to believe that her brother would engage in the conduct that he did. The third ground relating to the solicitor's cover was worthy of closer examination:

In examining all the facts, and most notably the solicitor's previous relationship with the wife of the brother, the procuring of the relevant documents by false statements and his implausible excuses in court all lead to a view that it was unlikely that the loss was compensable under the professional indemnity policy, a view subsequently accepted in litigation between the Registrar-General and [the professional indemnity insurer].<sup>227</sup>

The analysis undertaken in this article also identified that the result would have been no different if conveyance had occurred under the national electronic conveyancing protocols. Our conclusion was to wonder, particularly given that legal costs recoverable from the assurance fund were in excess of \$329,000, whether title insurance would have provided a simpler and less stressful mechanism to recover the loss occasioned

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<sup>225</sup> Peter Butt, 'Indefeasibility and Forged Mortgages: The Mortgage Fraud Epidemic Spreads to Victoria' (2012) 86 *Australian Law Journal* 84.

<sup>226</sup> (2011) 16 BPR 30, 229.

<sup>227</sup> Griggs and Low, above n 32, 23.

upon Pedulla. 'Perhaps the lesson to be learnt after all, is that given the one-off lifetime cover provided by title insurance, it is the market [that will respond to the problems] identified by Sir Robert Torrens some 160 years ago.'<sup>228</sup>

In seeking to promote my arguments in respect of how the coherence of title by registration can be enhanced, and to connect and support this legal doctrinal analysis with the work of other disciplines, I also undertook interdisciplinary analysis in considering the previously mentioned issue of abandonment of easements and the correctness of the title.<sup>229</sup> I suggested that both traditional economics and behavioural economics supported the conclusion that the primacy of the register should be paramount. Scarce resources were to be allocated to their highest value use, and this was only possible if the entitlement one was to receive was guaranteed. Transaction and information costs leading to a strict interpretation of Torrens — 'the mirror of the Register forever polished and the curtain never drawn [back].'<sup>230</sup> The loss averse nature of consumers also supported this analysis.<sup>231</sup>

Finally, consumer law and the intervention/empowerment paradigm of that discipline was used to support a view that immediate indefeasibility was sustainable, appropriate, and in line with ideas and principles that underlie title by registration.<sup>232</sup>

## 2.10 Legal Coherency within Land Law and with other Areas of Law

Finally, and while not necessarily specific to title by registration, I recently queried the role of negligence in imposing a duty on the servient owner of an easement towards the dominant owner.<sup>233</sup> Undertaking a doctrinal examination of the cases within tort law and within land law, I was critical of the role that tort law would play in intervening in this area. Reflecting on my overarching research question of coherence, I asked whether the use of tort would lead to a loss of coherence given that land law, and its centuries of common law thinking, had struck a balance between the rights of the

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<sup>228</sup> Ibid 35.

<sup>229</sup> Griggs, above n 194.

<sup>230</sup> Ibid 174-175.

<sup>231</sup> Ibid.

<sup>232</sup> Griggs, *Indefeasibility*, above n 83, 276-278.

<sup>233</sup> Lynden Griggs, 'Debunking negligence's role in imposing a duty on the servient owner of an easement towards the dominant owner' (2015) 23 *Australian Property Law Journal* 1.

dominant and servient owners. To now invoke tort law as a mechanism to overcome perceived problems, rather than seek to develop the principles of land law, was both unnecessary, unwarranted, and not justifiable. Coherence within land registration demands certainty and stability.

Alongside these previously mentioned peer-reviewed feature articles, I have also published shorter articles or case notes,<sup>234</sup> which are true to my argument about the need for coherence within our doctrinal understanding of title by registration. The first, published in 2003, suggested that the Queensland Court of Appeal in *Tara Shire Council v Garner, Arcape and Martin*<sup>235</sup> made an error in allowing knowing receipt liability (ie where fiduciary property is received by someone with knowledge of the breach of the fiduciary obligations)<sup>236</sup> to override the operation of title by registration. In this case, the defendants, the Garners, had become the registered proprietors of land on which was situated a motel, restaurant, newsagency, petrol station and water bore. The water bore was to be the subject of the dispute. The water bore was critical to the water supplies for the Tara Shire Council and for this reason, the Council had made an offer to purchase that part of the land on which the bore was located. This required the land be subdivided and when this was supposedly done the Council parted with \$65,000 for the purchase of the parcel on which the water bore was located. The Garners subsequently entered into a contract with Arcape whereby Arcape was to purchase the motel restaurant, newsagency and petrol station. For reasons that were not clear, when Arcape became the registered proprietor of land their title also indicated ownership of the land on which the water bore was located. The issue was reasonably straightforward. Arcape submitted that it had an indefeasible title upon registration and that even if it had notice of the unregistered interest, it was not bound by this knowledge. In reply, the Council argued that this was an appropriate matter for in personam to apply. More specifically, the Council submitted that Arcape had

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<sup>234</sup> Lynden Griggs, 'The Tectonic Plate of Equity – establishing a fault line in our Torrens landscape' (2003) *Australian Property Law Journal* 78 (*Tectonic*); Lynden Griggs, '*Hillpalm v Heavens Door Pty Ltd*' (2005) 15 *Australian Property Law Journal* 260 (*Hillpalm*); Griggs, above n 123; Lynden Griggs, 'To and From – but not across: The High Court, easements, Torrens and doctrinal purity' (2008) 15 *Australian Property Law Journal* 260 (*Doctrinal Purity*).

<sup>235</sup> [2003] 1 Qd R 556.

<sup>236</sup> For property related decisions relevant to this doctrine, see *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; *Bli No. 1 Pty Ltd v Kimlin Investments Pty Ltd* [2008] QSC 289; *Merrell Associates Ltd v HL (Qld) Nominees Pty Ltd* (2010) 241 FLR 49.

knowingly received trust property in a manner that was inconsistent with the rights of the Council, and because of this, the property was held in trust for the Council.<sup>237</sup>

In a split decision in the Queensland Court of Appeal, the arguments of the Council were accepted. According to the majority, indefeasibility, even though it was at the core of the Torrens system was not an absolute principle. If an equity arises by the conduct of the registered proprietor, such as by the retention of trust property, then this is sufficient to support the claim of the Council. In the minority, Davies JA considered that while indefeasibility would be subject to a claim in personam, the recognition of any equity in this instant matter would conflict with the fundamental principle that a person taking possession of the Torrens land was not to be weakened by notice, actual or constructive.<sup>238</sup> It was the decision of the minority judgement that I preferred, and the significance of my work was seen some years later when the High Court in *Farah v Say-Dee*<sup>239</sup> appeared to have corrected the error made by the majority in *Tara Shire Council*.

In *Farah v Say-Dee* (the facts of which are set out above at [2.3]), the High Court described it as a grave error for the New South Wales Court of Appeal to have held that a constructive trust based on unjust enrichment should have been imposed on the wife and daughters of the man behind Farah Constructions. There was nothing to show that the mother and daughters had 'consciousness of those elements which make participation transgress ordinary standards of honest behaviour.'<sup>240</sup> Importantly, in the context of land law and the principle of indefeasibility, the High Court indicated that while they had routinely provided the constructive trust remedy where the land was registered, this had no application where the defendant was not the primary wrongdoer. These authorities could not be applied where the allegation is merely that a person has notice of the interest or the fraud.<sup>241</sup> The impact of this article in the practising legal community is illustrated by its citation by the New Zealand Supreme Court.<sup>242</sup>

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<sup>237</sup> [2003] 1 Qd R 556, [55].

<sup>238</sup> Ibid [33].

<sup>239</sup> (2007) 230 CLR 89.

<sup>240</sup> Ibid [165].

<sup>241</sup> Ibid [168].

<sup>242</sup> *Regal Castings Limited v Lightbody* (2009) 2 NZLR 433, fn 171.

The third article<sup>243</sup> considered the effect that overriding legislation could have on title by registration. While this area has been significantly less litigated than the other exceptions to indefeasibility, the point has been made that the greatest threat to the operation and effectiveness of title by registration may well be where later legislation, either explicitly or implicitly, overrides the operation of indefeasibility.<sup>244</sup> In the High Court decision in *Hillpalm v Heaven's Door Pty Ltd*,<sup>245</sup> Torrens title property was subdivided into two lots, lot one and lot two. The subdivision was approved subject to the condition that an access over lot two was to be constructed for the benefit of lot one. Subsequently, lot two was further subdivided, and for reasons that were unexplained through the curial process, the certificates of title that were benefited and burdened by the proposed right-of-way did not include any notation or reference to the planned carriageway. In 1998, Heaven's Door bought lot one, and later that year Hillpalm purchased the relevant part of lot two. The question before the Court was: with no carriageway constructed nor appearing on the certificates of title could Heaven's Door insist upon the creation of a right of way in its favour?<sup>246</sup> Of the nine judges that heard this matter, six were in favour of Heaven's Door and the construction of the right of way. Ultimately, however, the three judges that formed the majority in the High Court were decisive. The lower courts and the minority judges in the High Court decided in favour of Heaven's Door on the basis that the consent to the subdivision by the Council created a right *in rem* they could be relied upon by all later transferees of the lot, irrespective of what was on the title. This right had been established by legislation enacted later than the Torrens legislation and this later legislation overrode indefeasibility. The majority of the High Court directly addressed this point, but ultimately felt the matter did not have to be resolved — the consent to the subdivision did not create a right *in rem*, merely a personal right, but if an *in rem* right had been created, 'there would have been a real and lively question about how the two statutory schemes ... were to be reconciled'.<sup>247</sup> As only a personal right had been created at the time of the subdivision, Heaven's Door could not insist upon the creation of the carriageway. The majority of the High Court, while sidestepping the

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<sup>243</sup> Lynden Griggs, 'Case Note: *Hillpalm Pty Ltd v Heavens Door Pty Ltd*' (2005) 11 *Australian Property Law Journal* 244.

<sup>244</sup> Pamela O'Connor, 'Exceptions to Indefeasibility of Title' (1994) 19 *Melbourne University Law Review* 649, 651.

<sup>245</sup> (2004) 220 CLR 472.

<sup>246</sup> *Ibid* [3].

<sup>247</sup> (2004) 220 CLR 472, [53].

coherence argument, did, I contend, give indefeasibility primacy and connect this with the mirror that the title was to represent.<sup>248</sup> The Court of Appeal decision, if left unchanged, would have imposed very significant requirements on conveyancing agents to search council records and determine the extent to which conditions of earlier planning requirements had been met.<sup>249</sup> The dependent nature of land titles that Sir Robert Torrens was so keen to rid from within our system of land administration would have been reinvoked, if the decisions of the lower courts had stood.

The final article examined the High Court decision in *Westfield Management v Perpetual Trustee Company*.<sup>250</sup> This case was about the right of a dominant tenement to use the easement to gain access to adjoining properties, with these adjoining properties not the subject of the benefit of the original easement. While focussing somewhat on the interpretation of the easement in question, the High Court was required to consider the extent to which extrinsic materials (that is material not on the register) could be used in interpreting the original easement.

Whereas the lower courts had engaged in detailed consideration and discussion of the use of extrinsic material to aid in the construction of the easement, the High Court was far blunter in its analysis. Their Honours considered that such an examination disguised the more fundamental matter. The Torrens system of title registration, its bedrock of indefeasibility and its publicly available register all lead to the conclusion that materials and matter available to third parties and not disclosed on the title could not be used in the discovering [of] what was intended by the original parties to the creation of the easement.<sup>251</sup>

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<sup>248</sup> A point agreed by Brendan Edgeworth, 'Planning law v property law: Overriding statutes and the Torrens system after *Hillpalm v Heaven's Door* and *Kogarah v Golden Paradise*' (2008) 25 *Environment and Planning Law Journal* 82, 83: 'As *Hillpalm* demonstrates, a majority of the High Court has adopted an approach that I will argue has its origins in *Breskvar v Wall* ... My conclusion is that if legislatures wish to override Torrens statutes, the more recent case law suggests that they will need to clear a high hurdle in order to make that intention unambiguously clear.'

<sup>249</sup> Ibid 97: 'The effect of the overriding provision is to create effectively an inalienable right – a right in rem – over such land in favour of councils ... From a public policy perspective, it enhances the planning goals of the legislation; but it simultaneously adds to the cost and complexity of conveyancing by making further inroads into the Torrens system and more searches of council records necessary. Perhaps it is time for policy makers to consider if, and how, these two divergent regulatory regimes might be better reconciled.'

<sup>250</sup> (2007) 239 ALR 75.

<sup>251</sup> Griggs, *Doctrinal Purity*, above n 234, 265. For discussion of the implications of this decision see Michael Weir, 'Westfield: 5 years on' (2012) 21 *Australian Property Law Journal* 166.



In summary, throughout this chapter I sought to demonstrate how my publications over the past 17 years have sought to promote the doctrinal coherence of the title by registration system that operates in Australia. But this was not done in isolation. It was undertaken to show how title by registration, (particularly that which we know as Torrens) can enhance the certainty and stability surrounding land registration. With unwavering support for immediate indefeasibility, my articles illustrate that as we evolve from paper-based to electronic conveyancing; we are able, with coherence, to soften the harshness of the application of this legal principle to achieve fair outcomes individually, but also collectively within the system. My view was that legislatures and the judiciary need to be cognisant of what we are trying to achieve with title by registration, and work to ensure that what we mean by legal coherence, 'can play a creative role in the curial [and legislative] development of the law.'<sup>252</sup> The role undertaken by me as an academic, with a particular focus on the role of unregistered interests, possessory interests, interdisciplinary analysis, and perhaps most importantly, the substantive principle of indefeasibility, has been to answer the fundamental dilemma facing land law. This problem looks at the conflict between two parties, both of whom are innocent of any wrongdoing, and determine how to resolve this predicament within a coherent principled framework. By consideration of the tenets of the curtain, mirror and indemnity and the proof elements contained within a well-functioning land administration system, I have been able to link the publications that I have had published with the doctrinal research methodology adopted. These points connect with the following chapter as I demonstrate how my work, and the knowledge created from this, have advanced understanding in the area of title by registration.

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<sup>252</sup> Gillooly, above n 72, 33.

### **Chapter 3: How the Research Question(s) contributed to the Advancement of Knowledge**

Sir Robert Torrens' distaste for English land law and for the Court of Equity is well known:

Twenty-two years have now elapsed since my attention was painfully drawn to the grievous injury and injustice inflicted under the English Law of Real Property by the misery and ruin which fell upon a relation and dear friend who was drawn into the maelstrom of the Court of Chancery, and I then resolved someday to strike a blow at that iniquitous institution.<sup>253</sup>

We can now ask with close to 170 years of jurisprudence associated with title by registration whether the creator himself would be pleased with what he introduced. I would suggest that overall he would. My title for this PhD by Published Work raised the question of whether we had seen a revolution or an evolution through the introduction and subsequent doctrinal learning of the Torrens system, or title by registration. My answer is both. The Torrens system radically changed the landscape and this development cannot be underestimated. Again, using the words of Torrens himself, the changes brought about by its introduction are clear:

In order to bring land under this simple and efficacious law, a preliminary step must be to cut off the necessity for retrospective investigation of title. By this the grand source of insecurity, of costliness, of intricacy, and of delay, is removed. Indefeasibility of title is a necessary corollary to this step, and from this again follows the necessity of providing a fund whence compensation in money may be secured to the rightful heirs and others who through the operation of the law may be barred from recovering the land itself. By transferring the liability from the land to the person of the individual deriving advantage from the error, with the right to claim compensation from a guaranteed Assurance Fund, failing the personal security, this object is effected in the manner most consistent with individual rights and with principles of public expediency. For there is scarcely any appreciable hardship in compelling the acceptance of pecuniary compensation to the full

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<sup>253</sup> Torrens, above n 6, v-vi.

value of the land; whilst grievous injury is inflicted by that law which in restoring to a rightful heir his inheritance, bestows upon him therewith the capital of innocent parties invested thereon, to an amount, it may be, far in excess of the value of the land itself.<sup>254</sup>

Perhaps these words mask the dramatic nature of what occurred. A transfer that was previously void at common law, now upon registration would pass, what ultimately became to be, an immediately indefeasible title. This applied even if the purchaser or the registered owner had notice of some other interest that was attached to the land. Title by registration is the model of a positive system of land registration. What registration does is validate the interests, subject to a relatively small number of exceptions. Perhaps the reason why it has occupied my thoughts for so long is that this positive system, as O'Connor describes it, creates a bi-jural inaccuracy.<sup>255</sup> Positive systems necessarily encompass the common law rules of land law, together with the legislation establishing title by registration. The Torrens system, or title by registration does not operate as a codification of the rules relating to land law to the exclusion of normal common law principles. This is where the problem occurs. At common law, the void transaction is ineffective to pass title. The response of the Torrens legislation is different: upon registration, the interest, provided the person has registered without fraud, will be validated and conclusive proof of its attachment to that parcel of land.

Despite this problem, three key benefits are perceived to result from title by registration. First, the register will operate as a mirror and will enable a person searching to find out all the significant facts relevant to that title; second, the dependent nature of land titles evident within the general law no longer applies — the searcher need not undertake an historical examination. Finally, where the register operates to disadvantage a person who would otherwise take or retain an interest by way of common law principles, they will be compensated by the state. If these three benefits are realised, then the criteria for a successful land administration system will be met. We will have:

- security of tenure for the holders of land interests (through the validation of a transaction leading to title granted by the act of registration);

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<sup>254</sup> Torrens, above n 6, 43.

<sup>255</sup> O'Connor, above n 16, 195.

- recognition of the significant land rights that affect the majority of the population (through indefeasibility extending to the usual land interests); and
- public trust within the operation of the system (through the mirror, reliance on the register, and compensation available when things go awry).

The value of my work, evidenced by the research collated in this PhD by Published Work, is its consistently and strongly held view of the benefits of the vision of Sir Robert Torrens for title by registration. As we engage with new processes, my work will continue to guide and influence the development of the common law principles to achieve a more coherent Torrens system, and fairer outcomes for individual parties. The integrity of the register (which I think we have largely achieved) will inevitably lead to the integrity of title by registration. The unfairness in individual outcomes that we see today will be reduced through the measures associated with verification of identity, the connection of this individual to the land, and the identification of the person who has the right to deal with the land. In effect, the embedded security measures now being adopted are reflective of my work. I suggest what I have achieved over the last 18 years is to elucidate and influence the evolutionary nature of our understanding of Torrens' jurisprudence in Australia, with my work cited internationally in Europe, Asia and North America.<sup>256</sup>

My answer to the research question is that, for the most part, the approach of the courts, particularly the High Court, and the legislature, has been consistent with the

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<sup>256</sup> Examples of where my work has been cited were given at n 178 to n 180, and further additional citations are noted here. The citations include the major Australian journals, as well as international citations including Singapore, New Zealand, Hong Kong, the United States of America, and Europe. For example, see Elizabeth Toomey, 'Why Revisit Sutton v O'Kane? The Tricky Trio: Supervening Fraud, the In Personam Claim and Landlocked Land' (2007) 13 *Canterbury Law Review* 263; Sharon Christensen, 'Electronic Land Dealings in Canada, New Zealand and the United Kingdom: Lessons for Australia' (2004) 11 *Murdoch University Electronic Journal of Law*; Luis J Arrieta-Sevilla, 'A Comparative approach to the Torrens System' (2012) 20 *Australian Property Law Journal* 203; Natalie Skead and Penny Carruthers, 'Fraud against the Registrar - An Unnecessary, Unhelpful and Perhaps, No Longer Relevant Complication in the Law on Fraud under the Torrens System' (2014) 40(3) *Monash University Law Review* 821; Murray Raff, 'Torrens, Hübbe, Stewardship and the Globalisation of Property Law Systems' (2009) 30 *Adelaide Law Review* 245; Mathew Harding, 'Barnes v Addy claims and the Indefeasibility of Torrens Title' (2007) 31 *Melbourne University Law Review* 343; Ana-Cristina Badita, 'O Privire Asupra Sistemului Torrens de Publicitate Imobiliara' (2009) 3 *Studia Universitatis Babes-Bolyai Jurisprudentia* 29; Janet November, 'The Mirror Principle and the Position of Unregistered Interests in the Torrens System' (2010) 1 *New Zealand Law Review* 151; Kelvin Low, 'The Nature of Torrens Indefeasibility: Understanding the Limits of Personal Equities' (2009) 33(1) *Melbourne University Law Review* 205; Sebastian Ko, 'Rectification and Indemnity in Land Title Registration: A Risk Analysis for Reform' (2013) 43 *Hong Kong Law Journal* 111; Michael Weir, 'The Westfield Case: A Change for the Better' (2009) *Bond Law Review* 197; Ben Frances Hudson, 'Living in Interesting Times: Landonline, Leader in its Field at What Cost' (2006) 12 *Canterbury Law Review* 12; Barry Crown, 'Whither Torrens Title in Singapore' (2010) 22 *Singapore Academy of Law Journal* 9; Una Woods, 'The English Law on Adverse Possession: A Tale of Two Systems' (2009) 38 *Common Law World Review* 27; Charles Szypszak, 'Public Registries and Private Solutions: An Evolving American Real Estate Conveyance Regime' (2003) 24 *Whittier Law Review* 663.

principles that led to the introduction of the Torrens system of land registration. Where courts or legislation have sought to ameliorate the harsh consequences that can result from the adoption of immediate indefeasibility, either through in personam, the acceptance of possessory interests, broad notions of what is fraud, restitutionary principles, or increased obligations on stakeholders within the conveyancing process, then it is hoped this modification or weakening has been tested against the ideals of the curtain, mirror and the indemnity. In some instances, those incursions cannot be justified. For others, such as increased obligations on stakeholders to verify identify, they can be seen as consistent with what Sir Robert Torrens was trying to achieve.

As the learning of electronic conveyancing takes hold, the evolution of the Torrens system will continue and from the impetus of national protocols for electronic conveyancing, the possibility of a substantive national Torrens Code. My work, by combining elements of a doctrinal study, the relationship of possessory interests, and interdisciplinary research, has argued, consistently and regularly, in favour of title by registration and there is no reason why in this country we should have eight models flowing from three common elements. My research methodology was, for the most part, doctrinal, with this requiring at its heart the identification of what the law is by a close examination of the relevant cases and applicable legislation alongside consideration of the existing secondary sources. Where the inevitable inconsistencies occur in the federation that is Australia, I then sought to clarify the law in light of the criteria by which we judge land registration systems. What this research shows is that in those key areas of recognition of unregistered interests, the use of the exceptions to indefeasibility, and the role of possessory interests within Torrens, we struggle with the maintenance of coherence. The adoption by some overseas jurisdictions of deferred indefeasibility, the continued recognition of possessory interests (even though severely circumscribed in Tasmania), and an expanded understanding of in personam through the use of restitutionary doctrines has, on occasions, threatened to undermine the coherence and consistency that I am seeking.

Most recently, and with the advent of electronic conveyancing, a move designed to be neutral in terms of the substantive law, the importance of my work is that it has articulated some concerns around the continued operation of the system unless the appropriate security measures are put in place. While our policy makers and regulatory

bodies have identified verification of identity as a key to ensuring that land registration by Torrens continues without significant change, the move from interested parties signing and attesting documents on their own behalf (a security measure in itself) to one where agents do this on behalf of the individual is the most significant change to conveyancing since the introduction of title by registration. This move will represent new opportunities for fraud, and create dangers and a possible lack of confidence in the system, hence the need for consideration of how we connect the verified identity to the ownership of the land, and furthermore, how we can be assured that there is no competing interest such as a mortgagee with the right to control use of that land. Arguably, this may create a challenge to the coherence of Torrens through an expanded definition of what is fraud, or as happens in Ontario<sup>257</sup> and Malaysia,<sup>258</sup> through the acceptance of deferred indefeasibility. The digital environment has the potential to realise fully the benefits of Torrens — a title which reflects all, or nearly all interests pertaining to that parcel of land, and an opportunity to ensure that the mirror is reflecting with high resolution and precision. It is my view that the introduction of national electronic conveyancing practice presents the most significant opportunity for the development of a national Torrens code,<sup>259</sup> the advantages of which were noted by Sir Garfield Barwick long ago in the 1971 seminal authority of *Breskvar v Wall*.<sup>260</sup>

The breadth and depth of my work evidence the unique and scholarly contribution that I have made and disseminated amongst my peers and the wider community. My work has made an original contribution to the scholarship of the Torrens system of land registration, and through doctrinal analysis and economics/law and consumer law frameworks, I have succeeded in showing that consistency and coherence within title by registration land systems is ever evolving. Torrens' distaste for equitable interests and the Court of Chancery was not shared by the legal profession, who arguably saw this as a means to mollify the grand law reform that was title by registration. I have consistently argued that our language should refer to the registered and unregistered, rather than legal or equitable, and while this battle has not been won, recent moves by

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<sup>257</sup> *CIBC Mortgages v Computershare* [2015] ONSC 543.

<sup>258</sup> *Mohd Nasir bin Moidu v Lee Swen Kim* [2011] 7 MLJ 606, 613.

<sup>259</sup> See the discussion of the advantages of a national Torrens Code at Law Council of Australia, above n 156. However, I appreciate the political realities make the likelihood of this occurring somewhat remote.

<sup>260</sup> (1971) 126 CLR 376, 386.

the High Court to heighten the importance of the caveat do lead down that path, and implicitly recognise the value of my work.<sup>261</sup>

Similarly, as for possessory interests, their place continues, although with some jurisdictional differences, in a more constrained manner — a direction that my publications have consistently argued. The opposition to possessory interests existing outside of the title evident by legislative moves to limit their operation, with this seen, for example, in Tasmania and the United Kingdom.<sup>262</sup> I also argue that consistent with the coherence of Torrens, a narrow reading of *in personam*, and restitutionary claims are necessary. For the moment, I would suggest my view is consistent with the High Court, though this will remain a constant battlefield while immediate indefeasibility results in, on occasions, significant individual injustice. Finally, my work on electronic conveyancing, which began some 15 years ago, foreshadowed the imminent development of digitisation of the conveyancing process and the need for appropriate security measures to be put in place. Today we are heeding that warning though time will only tell if we have done enough to ensure that security is maintained, that the majority of land interests utilised are accepted onto the register, and that public trust in the system of title by registration is upheld. This is, after all, probably the most important criterion. If public trust is lost, the move to make changes will be irresistible. That could see a loss of coherence, something to which I will continue to rally against as it will undermine the alignment between concept and interpretation that I believe is critical to preserve. To remove that link will move our understanding of the substantive law of title by registration into a realm where more nebulous, opaque and subjective notions of fairness will become dominant. Land is too valuable a resource, and too critical to the community, to have the land administration system undermined through an appeal to an argument that the outcome is unfair in a very small number of instances. Stability and certainty within the framework of title by registration will work to ensure that the system meets the expectations of the community, and where loss of title is only ‘sporadic, rare and unpredictable’,<sup>263</sup> the entire system should not be amended to fill a perceived notion of what is right in an individual case. This work continues to this day with my current and ongoing research examining the use of

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<sup>261</sup> eg, *Black v Garnock* (2007) 230 CLR 438.

<sup>262</sup> In Tasmania, see Part IXB *Land Titles Act 1980*. In the United Kingdom, see Schedule 6 *Land Registration Act 2002*.

<sup>263</sup> Cooper, above n 12, 130.

blockchains<sup>264</sup> as a mechanism to embed superior safety and security into the land administration system and how this technology (which are the software protocols behind Bitcoins) can achieve a better, more stable, more certain, and ultimately fairer Torrens system.<sup>265</sup>

### 3.1 Conclusion

My research question investigated to what extent the judicial and legislative developments concerning title by registration have achieved doctrinal coherence with the ideas that underlie a title by registration (or Torrens) system of land registration.

### **Research Findings**

Broadly speaking the findings of my research suggest that immediate indefeasibility remains the substantive principle of choice when compared with deferred indefeasibility. While deferred indefeasibility will often be intuitively appealing, preferring as it often does the aggrieved homeowner vis-à-vis the financial institution, when this debate is examined from a perspective of what we are trying to achieve with Torrens title, immediate indefeasibility is to be preferred. Importantly though, my more recent work on the three proof elements and the move to electronic conveyancing suggest that there are ways in which the opportunity for fraud and the loss of title of the innocent homeowner can be minimised, without undermining the coherence of title by registration.

In line with this view of indefeasibility, I have also submitted that possessory interests have no role to play when seeking coherence in a title by registration system. Once it is accepted, and in my view it is indisputable, that the registration of title is the

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<sup>264</sup> 'A blockchain is a technical component of a distributed ledger, and refers to the chain of transactions that reside within the ledger. Transactions are grouped into "blocks", and as they are verified, a new "block" is added to the chain of previous transactions. The ledger is updated – instantaneously, permanently and irrevocably for all users to reflect the new status of the ledger with the additional block. The blockchain is therefore an accurate record of the history of the entire ledger.' Allens-Linklater, *Blockchain Reaction*, June 2016, 4, accessible at <<https://www.allens.com.au/data/blockchain/index.htm>>

<sup>265</sup> For discussion in the context of land administration, see Aanchal Anand, Mathew McKibbin and Frank Pichel, 'Colored Coins, Bitcoin, Blockchain and Land Administration' (Presentation to *Scaling up Responsible Land Governance*, Annual World Bank Conference on Land and Poverty, Washington DC, 14-18 March 2016); Dobhal and Regan, above n 21; Michael Mainelli and Mike Smith, 'Sharing ledgers for sharing economies: an exploration of mutual distributed ledgers (aka blockchain technology) (2015) 3(3) *Journal of Financial Perspectives* 1.



mechanism by which the interest in land is created, then interests that emanate from acts outside of the register should have no influence except in limited circumstances. While possessory interests remain as theoretically available, in some jurisdictions, notably my own in Tasmania, and the United Kingdom - the possibility of success is remote.

My research has also suggested that, as the practical importance of unregistered interests remains, the caveat should be given an enhanced role in protecting these types of interests. Recent decisions such as *Black v Garnock*<sup>266</sup> support such a move, allowing the register to move closer to becoming the mirror that it was intended to be.

Finally, my most recent work looking at the effect of electronic conveyancing on these substantive points has been to highlight how, when examining what we are trying to achieve with a title by registration system, we should keep in mind the three proof elements of identity verification, connection with the land and control of the right to deal. When this is done and linked with security protocols in respect of the certificate of title, and access to the electronic workspace, then the goals of a successful land administration system and the principles that drove Sir Robert Torrens can be met.

### ***Areas of Further Research***

When considered globally, the most active area for consideration appears to be the role that blockchains and their use in distributed registers (ie where there is no central registry, or where the central registry has a more limited role) will play in achieving the security protocols that can reduce, if not eliminate, some of the fraud that currently bedevils the Torrens system. While blockchains appear to be of significant advantage in a jurisdiction where the country's land records are poorly kept; have been destroyed deliberately or by natural disaster; or where the government registry is corruptible or inadequately resourced, the news that Sweden<sup>267</sup> and the Republic of Georgia<sup>268</sup> are investigating the use of blockchain technology in its land administration centre demonstrates its application to mature and well-resourced land registries. Specifically this technology has the potential to reduce the types of fraud that occasionally appear

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<sup>266</sup> (2007) 230 CLR 438.

<sup>267</sup> < <http://www.coindesk.com/sweden-blockchain-smart-contracts-land-registry/>>.

<sup>268</sup> <<http://www.coindesk.com/bitfury-working-with-georgian-government-on-blockchain-land-registry/>>.

in title by registration jurisdictions (particularly double-dealing in the one parcel of land), and by creating additional layers of security, limit opportunities for wide-scale fraud. As to how this distributed ledger technology will cater for the fragmented nature of land interests held in the individual parcel remains under active consideration.

My work will also continue to examine how indefeasibility will evolve as legislatures, such as New Zealand, examine ways to better balance fairness in an individual transaction with the collective goals of Torrens, with this jurisdiction proposing that immediate indefeasibility be subject to a test of 'manifest injustice', with title overturned if this appeal to fairness is established.<sup>269</sup> While my initial view on this proposal sees it as creating a category of discretionary indefeasibility, research continues on the extent to which this undermines the curtain, mirror and the indemnity.

Outside of these very significant changes, ongoing research will continue to place parameters about the role of in personam, and the further evolution of possessory interests (particularly as human rights jurisprudence becomes more significant), and the future function of caveats, with trends indicating a likely expansion and a more important role.

### ***A Final Reflection***

It is suggested that the body of my work, encompassing peer-reviewed publications, books chapters for students, research monographs for practitioners and academics, conference presentations, and contributions to law reform proposals, as well as citation in superior courts has made a significant and original contribution to the jurisprudence on title by registration. My work has been deliberated upon and cited by many, and as previously noted<sup>270</sup> has challenged others to consider alternate views, or advance policy reform. My work, through the secondary sources forming part of this PhD by Published Work, and the allied additional material to which I have contributed, has been part of the conversation that has led to legislative change (eg adverse possession/possessory easements/security measures), or promoted or encouraged a view of the Torrens system differently than what currently exists. It is work that is

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<sup>269</sup> See the *Land Transfer Bill 2016* (New Zealand).

<sup>270</sup> See footnotes 178-180, and 256.

ongoing with the advent of electronic conveyancing. It will continue to see me submitting that one of the most significant intellectual exports of this country should continue to provide a secure, trusted, and relatively inexpensive method of achieving a safe and efficient form of land administration. Through the research methodology of doctrinal research, the peer-reviewed publication process and subsequent dissemination, I have generated 'original knowledge and understanding to make a substantial contribution to a discipline or area of professional practice.'<sup>271</sup> In so doing, I have '[developed, adapted and implemented] research methodologies to extend and redefine existing knowledge,'<sup>272</sup> and evidenced that I have 'autonomy, authoritative judgement, adaptability and responsibility'<sup>273</sup> as a scholar in the field of the Torrens System of land registration. My work has not always been agreed upon, but I would suggest there is no doubt that I have made an original and significant contribution to the literature on the Torrens system of land registration.

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<sup>271</sup> Wording adopted from the AQF level 10 Criteria: see, Australian Qualifications Framework Council, *Australian Qualifications Framework* (Australian Government, 2<sup>nd</sup> ed, 2013) 64.

<sup>272</sup> *Ibid.*

<sup>273</sup> *Ibid.*

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## **Publications in Chronological Order**

# TORRENS TITLE — ARISE THE REGISTERED AND UNREGISTERED, BEFALL THE LEGAL AND EQUITABLE

LYNDEN GRIGGS\*

## I INTRODUCTION

*'[T]he continued advantage of identifying principles as legal or equitable must be open to question.'*<sup>1</sup>

*'[L]awyers will cease to enquire whether a given rule be a rule of equity or rule of common law.'*<sup>2</sup>

Property Law is consistently faced with the dilemma of competing claims to real property by people who can be designated as innocent parties. As noted by Hughson *et al*

[t]here are two main ways of resolving such conflicts. One approach is to protect the holder of an interest by preventing the transferor from passing a title which he or she lacks....The alternative approach, typified by systems of registration of title, is to protect innocent purchasers of interests, regardless of whether or not the transferor has a good title.<sup>3</sup>

In this context consider the facts of *Gibbs v Messer*.<sup>4</sup> A solicitor forged the signature of a client to an instrument that transferred land to a fictitious person. The solicitor purporting to act for this fictitious person obtained a loan on the security of a mortgage to one McIntyre. In this case, should the innocent client of the solicitor or the mortgagee later prevail? The contest was between two innocent parties. Whilst the Privy Council held that the mortgage should be removed from the register, a decision which may not apply

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<sup>1</sup> LBC, *Laws of Australia*, vol 28 (as at 29 July 1999) 28 Real Property, '28.1 Principles of Real Property' [101].

<sup>2</sup> Frederic Maitland, *Equity: A Course of Lectures* (2<sup>nd</sup> ed, 1947) 20.

<sup>3</sup> Mary-Anne Hughson, Marcia Neave and Pamela O'Connor, 'Reflections on the Mirror of Title: Resolving the Conflict between Purchasers and Prior Interest Holders' (1997) 21 *Melbourne University Law Review* 460, 461.

<sup>4</sup> [1891] AC 248.

today,<sup>5</sup> the critical aspect to note is that whatever result, an innocent party would have been deprived of an interest in land.

The solution in the case of registered or Torrens title land has been to protect, in the main, the innocent purchasers of title. This has permitted a conveyancing system which is relatively inexpensive, quick, and for the most part, accurate, to flourish. The philosophy behind this system is the provision of a conclusive title, a registration process that the state guarantees as a mirror of the title.<sup>6</sup> Purchasers simply need inquire as to registration and to ascertain what that contains:

The registration scheme must be so comprehensive as to provide procedures for handling every kind of interest possible... It must be possible to register any legitimate interest or claim, so that *the moving question is whether the claim is or is not registered*. If the claim is properly registered, it is effective; if it is not registered, it is ineffective.<sup>7</sup> (emphasis added)

Under a registration system, then, the question of entitlement has been subjugated in many cases to the issue of whether the interest is legal and registrable, or legal but not registrable, equitable (possibly registrable, possibly not), a mere equity coupled with or without a proprietary right, or a personal equity. This paper will argue, by way of appeal to history, case law and academic support, that the law of property should be prepared to dispense with a determination of priorities by the nature of the interest, and instead turn to a system whereby Parliament mandates the registration of certain interests, the availability of caveating for those interests that cannot be registered and for priority to be resolved by the date of registration or lodgment of the caveat. In this respect the policy of the law must be to encourage the registration of interests, to have a title which truly mirrors the interests attaching to the land to determine priority, not by a system of priority rules introduced to deal with a division of interests into law or equity, but by the first to register their interest. To this extent, the paper does not attempt the more ambitious argument that legal and equitable interests should be abolished completely, rather it seeks to advance the submission that the general law priority rules, based as they are on the division between law and equity, should be substituted by a system of priority by caveating.<sup>8</sup>

There is no doubt that the goal of Sir Robert Torrens (as the architect of the land registration system which bears his name) was to protect the purchaser and to override the interests of those holding what traditionally would be considered equitable interests.

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<sup>5</sup> Given the acceptance of immediate indefeasibility in Australia - see *Breskvar v Wall* (1971) 126 CLR 376. The case has been restricted by subsequent authority - see for example *Garofano v Reliance Finance Corporation Ltd* (1992) 5 BPR 11,941; *Wicklow Enterprises Pty Ltd v Doysal Pty Ltd* (1987) 45 SASR 247.

<sup>6</sup> As noted by Dent Bostick, 'Land Title Registration: An English Solution to an American Problem' (1987) 63 *Indiana Law Journal* 55, 60-61 '[t]he ideal system substitutes registration for any inquiry into actual or constructive notice of facts about ownership...the registration system will function so that one registration card, clearly and simply arranged, will mirror exactly the state of a title at any given moment.'

<sup>7</sup> *Ibid* 61.

<sup>8</sup> The argument that legal and equitable interests should be abolished completely is beyond the scope of this paper. Issues that would be raised by this question include the creation of interests (if we abolish the distinction between law and equity - what reference is there to say that an interest exists). Similarly, at present, the remedies available can depend on whether the interest is categorised as legal or equitable.

These were to be regarded as mere contracts.<sup>9</sup> Indeed the influence of the Court of Chancery on land titles was a point of criticism by Torrens.<sup>10</sup> Today there is a range of equitable interests recognised by the courts in relation to land transactions - but it is this very range and the continued renaissance of equity in Australia<sup>11</sup> that demands a reconsideration of the manner in which we resolve disputes between innocent parties in relation to land. As stated extra-judicially by Sir Anthony Mason,<sup>12</sup> equity 'has extended beyond old boundaries into new territory where no Lord Chancellor's foot has previously left its imprint.'<sup>13</sup> It is this very extension of equity that has brought the ideas of fairness and good conscience (the foundations of equity jurisdiction) so sharply into conflict with the processes of Torrens title. The Torrens form of land transfer necessitates a level of certainty and 'determination which is, in many ways, directly oppositional to the approach taken by equitable principles of fairness.'<sup>14</sup>

The purpose of this article is to outline the equitable interests that can be raised in relation to land, to question whether the division between law and equity need be maintained in a post Judicature Act world (particularly in the case of Torrens title land) and to consider the historical, academic and case law basis for dispensing with the division between legal and equitable and to substitute a demarcation between registered and unregistered, specifically in the case of priority disputes. The disputes that arise from the present division between law and equity will be discussed to illustrate the advantages of dispensing with the current regime.

This article will be structured in the following manner. After a brief review of the current state of equitable interests available, part III outlines the historical derivation of equitable jurisdiction which is then followed by a consideration of the consequence of separation between law and equity - the priority rules. This will be followed by a critical analysis of the continuing relevance of the division between law and equity (and the division within equity itself). I will conclude with a plea for a radical rethinking of the concepts of law and equity for priority disputes by calling for a revised division between registered and unregistered interests.<sup>15</sup>

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<sup>9</sup> Hughson, Neave and O'Connor, above n 3, 461.

<sup>10</sup> See the comments by Les McCrimmon, 'Protection of Equitable Interests Under the Torrens System: Polishing the Mirror of Title' (1994) 20 *Monash Law Review* 300, 301.

<sup>11</sup> See the comments by Hughson, Neave and O'Connor, above n 3, 462.

<sup>12</sup> Anthony Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 *Law Quarterly Review* 238.

<sup>13</sup> *Ibid.*

<sup>14</sup> Samantha Hepburn, 'Concepts of Equity and Indefeasibility in the Torrens System of Land Registration' (1995) 3 *Australian Property Law Journal* 41.

<sup>15</sup> As pointed out by Edward Sykes and Sally Walker, *The Law of Securities* (5<sup>th</sup> ed, 1993) 452 there are certain interests which although legal in nature at general law cannot be registered on a Torrens title register - implicitly providing support for the idea that the division between law and equity, for purposes of resolving priority disputes, need not necessarily be maintained. See generally W N Harrison, 'Indefeasibility of Torrens Title' (1952) *University of Queensland Law Journal* 206.

## II THE RANGE OF EQUITABLE INTERESTS ACCEPTED BY COURTS TODAY

The principal equitable interest is that of the beneficiary under a trust. This form of relationship results where ownership of the property is divided between the trustee (holding the legal interest) and the beneficiary (holding the equitable interest). An express trust is occasioned by the legal owner intentionally conferring a benefit upon another, thus dividing the ownership of the property.<sup>16</sup> By contrast, a resulting trust is implied in circumstances where the law accepts that the legal owner is not to enjoy the beneficial interest in the property. For example, this may arise where an individual purchases property, but has the property registered in the name of another. The circumstances may indicate that this is not a gift to the latter person, but an intent for that individual to hold the legal interest for the benefit of the purchaser.<sup>17</sup> A constructive trust is imposed without regard to the intent of the parties, but in line with what the court views as conscionable conduct.<sup>18</sup>

Contracts for the sale of land also impose an equitable interest on the putative purchaser.<sup>19</sup> Thus, in some circumstances, the property is at the risk of the purchaser from the date of signing the contract and before settlement. Equity has also recognised interests such as informal leases,<sup>20</sup> the agreement for a lease,<sup>21</sup> interests arising from the doctrine of part performance,<sup>22</sup> informal mortgages,<sup>23</sup> the equity of redemption<sup>24</sup> and restrictive covenants.<sup>25</sup> Equity also recognised a category of interests somewhat less than the equitable interest - equities arising out of proprietary estoppel<sup>26</sup> and ancillary equities which permit the holder to complain of misrepresentation, fraud, undue influence and mistake.<sup>27</sup>

Arguably what we have failed to achieve or recognise in Australia is that with the enactment of a wholly new system brought on by the Torrens legislation, the division

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<sup>16</sup> For a discussion of the origins and nature of a trust see *DKLR Holding Co Pty Ltd (No 2) v Commissioner of Stamp Duties* [1980] 1 NSWLR 511 ('DKLR Holding'). As for the formalities for the creation of an express trust over land see Adrian Bradbrook, Susan MacCallum and Anthony Moore, *Australian Property Law Cases and Materials* (1996) [4.5].

<sup>17</sup> See *House v Caffyn* [1922] VLR 67; *Wirth v Wirth* (1956) 98 CLR 228; *Carkeek v Tate-Jones* [1971] VR 691.

<sup>18</sup> See *Baumgartner v Baumgartner* (1987) 164 CLR 137; *Muschinski v Dodds* (1986) 60 ALJR 52, 64-66 (Deane J).

<sup>19</sup> See *Lysaght v Edwards* (1876) 2 Ch D 499.

<sup>20</sup> See *Chan v Cresdon Pty Ltd* (1989) 168 CLR 242.

<sup>21</sup> See *Walsh v Lonsdale* (1882) 21 Ch D 9.

<sup>22</sup> See *Francis v Francis* [1952] VLR 321; *Thwaites v Ryan* [1984] VR 65; *Australia and New Zealand Banking Group Ltd v Widin* (1991) 102 ALR 289.

<sup>23</sup> See *Stubbs v Slater* [1910] 1 Ch 632.

<sup>24</sup> See *Knightsbridge Estates Trust Ltd v Byrne* [1939] 1 Ch 441; *Noakes & Co Ltd v Rice* [1902] AC 24.

<sup>25</sup> See *Tulk v Moxhay* [1848] 2 Ph 774; 41 ER 1143.

<sup>26</sup> See *Olsson v Dyson* (1969) 120 CLR 365.

<sup>27</sup> See *Latec Investments Ltd v Hotel Terrigal Pty Ltd* (1965) 113 CLR 265; *Barclays Bank plc v O'Brien* [1994] 1 AC 180; *Blacklocks v JB Developments (Godalming) Ltd* [1982] Ch 183; *Swanston Mortgage Pty Ltd v Trepan Investments Pty Ltd* [1994] 1 VR 672.

between law and equity should have been abandoned for priority disputes. As stated by Duncan and Willmott

[t]he enactment of the Torrens system legislation throughout the several colonies of Australia, as they then were, should have presaged a change in attitude for lawyers dealing with interests under the new statutes. However, for some time, the ghosts of the old system continued to haunt the interpretation of the new Torrens statutes.<sup>28</sup>

### III HISTORICAL BASIS FOR EQUITY<sup>29</sup>

The equitable jurisdiction arose out of the inadequacies of the common law,<sup>30</sup> and in relation to land the inadequacies in the systems of tenure and estates. The common law proscribed an individual from passing an estate in land by way of will;<sup>31</sup> identity of the owner was critical to the imposition of feudal dues;<sup>32</sup> and there were strict requirements for the passing of an interest in land.<sup>33</sup> In response to these restrictions the Chancellor, on behalf of the King, and in the exercise of the residual power of the Monarch, heard complaints that could not be dealt with at common law:

The Chancellor's jurisdiction was confined to situations where the common law could not act because, for example, there was no recognised writ the plaintiff could use for the type of damage the plaintiff had suffered. Equity did not attempt to destroy the rules of common law but only to affect the way in which they operated.<sup>34</sup>

In the context of land law the critical development was the instigation of the 'use' to overcome the problems of the common law restrictions on land ownership, imposition and transferability and it was the acceptance by the Court of Chancery of this arrangement<sup>35</sup> that led to the creation and acceptance of the equitable interest. From this initial development the courts of equity have continued to expand and develop the range of equitable interests. Further, equity had the capacity to permit the creation of interests unattainable at common law. The creation of the estate contract and the mortgagor's equity of redemption are early examples of equity being used in such a fashion. A more

<sup>28</sup> William Duncan and Lindy Willmott, *Mortgages Law in Australia* (2<sup>nd</sup> ed, 1996) 2. See also the comments of Cockle CJ in *Trust and Agency Co v Markwell (No 2)* (1874) 4 QSCR 50, 52 where his Honour indicated that the 'old system' in relation to mortgages was no longer operative.

<sup>29</sup> For a discussion of the basis for equitable jurisdiction, and in particular, the origins and nature of the trust see *DKLR Holding* [1980] 1 NSWLR 511.

<sup>30</sup> As stated by Bradbrook, MacCallum and Moore, above n 16, [4.1] 'the development of the equitable interest in land law began primarily as a result of the many fetters the common law placed on the holders of freehold estates.'

<sup>31</sup> LBC, above n 1, [73].

<sup>32</sup> See the *Statute of Mortmain* 1279.

<sup>33</sup> Edward Burn, *Modern Law of Real Property* (14<sup>th</sup> ed, 1988), 40.

<sup>34</sup> LBC, above n 1, [76].

<sup>35</sup> Of course, the King instigated the passage of the *Statute of Uses* 1535 to protect his revenue. Ultimately the change in social conditions and the decline of the doctrines of tenures and estates led to the acceptance of the use upon a use in *Tyrrel's Case* (1557) 2 Dyer 155a; 73 ER 336.

recent example is that of the restrictive covenant - an interest in land that is purely equitable.<sup>36</sup>

Notwithstanding this, in the context of priority disputes concerning title to land by registration, what is the relevance and importance of the division of interests between law and equity? Whilst it is critically important to remember that the development of the Torrens system of land registration was a later development than the initial musings of equity, systems of land registration have dated from 3000 BC.<sup>37</sup> Given this, the opportunity to rethink the role of Torrens title, its method of recordation of interests and the resolution of competing disputes is important. In this sense, what is being suggested here is more in the way of a reclamation of historical beginnings and an opportunity to correct those facets which were not considered at the time of the initial systems of land registration.<sup>38</sup>

After the establishment by the Court of Chancery of equitable interests, the problems created by the division between common law and equity became all too apparent. The common law courts of Common Pleas, Exchequer and Queens Bench heard matters arising out of common law; equity was confined to its own jurisdiction and to remedying those perceived defects of the common law. In terms of land law, this development saw the creation of different interests, their enforcement by different measures and their termination in different circumstances.<sup>39</sup> The difficulties that this caused led to the unification of the principles of common law and equity by the *Judicature Acts 1873* (UK).<sup>40</sup> After this, courts were invested with both equitable and legal jurisdiction, claims from either base could be brought in the one matter, and remedies from either jurisdiction could be sought. Whilst the procedure was fused, it is generally accepted that the principles were not.<sup>41</sup> Accordingly, disputes between legal and equitable interests, and between equitable interests and mere equities, were destined to plague Property Law. However, in this post-*Judicature Act* world and in recognition of a system of title by registration,<sup>42</sup> maintaining any division between law and equity for the determination of priority disputes has no place. Support for this can be sought from this very system of priority rules currently in force, as these are applied to resolve disputes between interests of the nature of legal, equitable and mere equities. It is therefore necessary to turn to a brief discussion of the priority rules.

<sup>36</sup> See LBC, above n 1, [84].

<sup>37</sup> See the historical discussion in Timothy Hanstad, 'Designing Land Registration Systems for Developing Countries' (1998) *The American University International Law Review* 647, 647-649.

<sup>38</sup> Not surprisingly given that the division between law and equity was not yet apparent.

<sup>39</sup> See the comments by Joyce Tooher and Bryan Dwyer, *Introduction to Property Law* (3<sup>rd</sup> ed, 1997) 41.

<sup>40</sup> This was accepted in most Australian States shortly thereafter (eg. in Victoria in 1883 - the one exception to this was New South Wales, which did not unify until 1973).

<sup>41</sup> For a discussion of what is known as the fusion fallacy see Fiona Burns, 'The 'Fusion Fallacy' Revisited' (1993) 5 *Bond Law Review* 152.

<sup>42</sup> It can be noted that both the *Judicature Acts* and the system of Torrens title date from a similar time. The original *Judicature Act* dates from 1873, the original Torrens titles Act, the *Real Property Act* (SA) from 1857-1858.



## IV LAW, EQUITY AND PRIORITIES

The consequence of the retention and classification of interests as legal, equitable, a mere equity, a personal equity or an equity coupled with a proprietary interest is that the courts were required to develop a system of resolution of disputes. At the outset, it is important to note that there was recognition that a system of registration, where priority is determined by the date of registration, was perceived to be advantageous over reliance upon pure common law principles. In Australia, all States now have legislation that provides for the registration of instruments affecting common law or 'old title' land.<sup>43</sup> In New South Wales, Queensland, Tasmania, and Victoria priority is accorded by date of registration.<sup>44</sup> In South Australia, the legislation does not expressly provide priority to the first registered, though the first registered in all probability will obtain priority.<sup>45</sup> In Western Australia, priority is accorded to those first registered, but in respect of those unregistered instruments - they shall be invalid against any purchaser in good faith and for valuable consideration.<sup>46</sup>

These registration procedures dovetail into the common law principles of priority disputes. The very fact of the existence of a multitude of common law principles adopted in relation to disputes surrounding old title land – principles such as priority between legal interests determined by the date they came into operation;<sup>47</sup> an equitable interest created in first in time will override the later equitable interest provided the merits are equal;<sup>48</sup> that an equitable interest will prevail over an earlier mere equity provided the equitable interest is obtained for value and without notice;<sup>49</sup> that an earlier legal interest will prevail over a later equitable interest;<sup>50</sup> and that a later legal interest will prevail over an earlier equitable interest if acquired for value, in good faith and without notice of the earlier equitable interest<sup>51</sup> – is evidence enough of the need to rethink the manner in which the competing claims of two 'innocent' parties are considered. These principles,

<sup>43</sup> *Conveyancing Act 1919* (NSW); *Property Law Act 1974* (Qld); *Registration of Deeds Act 1935* (SA); *Registration of Deeds Act 1935* (Tas); *Property Law Act 1958* (Vic); *Registration of Deeds Act 1856* (WA).

<sup>44</sup> *Conveyancing Act 1919* (NSW) s 184G; *Property Law Act 1974* (Qld) s 246; *Registration of Deeds Act 1935* (Tas) s 9; *Property Law Act 1958* (Vic) s 6.

<sup>45</sup> On this see Sykes and Walker, above n 15, 414.

<sup>46</sup> See *Registration of Deeds Act 1856* (WA) s 3.

<sup>47</sup> Application of the principles that *nemo dat quod non habet*: a person cannot convey an interest which they do not have.

<sup>48</sup> *Heid v Reliance Finance Corporation Pty Ltd* (1983) 154 CLR 326 ('Heid'); *Phillips v Phillips* (1861) 4 De GF & J 208; 45 ER 1164; *Rice v Rice* (1853) 2 Drewry 73; 61 ER 646; *Cave v Cave* (1880) 15 Ch D 639. All property law practitioners would be aware that the maxim has many permutations and combinations - for example is it a principle of first or last resort? See Henry Long, 'Finding the Better Equity: the Maxim Qui Prior Est Tempore Potior Est Jure and the Modern Law Relating to Equitable Priorities' (1996) 3 *Deakin Law Review* 147; A J Oakley, 'Judicial Discretion in Priorities of Equitable Interests' (1996) 112 *Law Quarterly Review* 215. Similarly there are many exceptions, eg. beneficiaries under trusts - *Shropshire Union Railways and Canal Co v The Queen* (1875) LR 7 HL 496.

<sup>49</sup> *Latec Investments Ltd v Hotel Terrigal Pty Ltd (In Liq)* (1965) 113 CLR 265.

<sup>50</sup> In accordance with the maxim 'where the equities (the merits of the case) are equal the law prevails'. Many exceptions apply to this maxim: see *Northern Counties of England Fire Insurance Co v Whipp* (1884) 26 Ch D 482; *Barry v Heider* (1914) 19 CLR 197; *Walker v Linom* [1907] 2 Ch 104; *Perry Herrick v Attwood* (1857) 2 De G & J 21; 44 ER 895.

<sup>51</sup> *Pilcher v Rawlins* (1872) LR 7 Ch App 259. See also the doctrine of *tabula in naufragio* - *Wortley v Birkhead* (1754) 2 Ves Sen 571; 28 ER 364; *Blackwood v London Chartered Bank of Australia* (1874) LR 5 PC 92.

devised to resolve disputes in 'old system' title have largely been extrapolated for use in relation to Torrens land, though modified with the particular practices relevant under that system - in particular the concept of caveating.<sup>52</sup> Given this background to the creation and resolution of disputes between legal and equitable interests, the next part of the article will examine the continuing relevance of legal and equitable interests within the Torrens system of land registration.

## V THE CONTINUING RELEVANCE OF LEGAL AND EQUITABLE INTERESTS IN TORRENS SYSTEM LAND

Torrens felt that prior to registration, interests under contracts should not be classified as property rights. He

seems to have given little consideration to the situation of holders of unregistrable interests, though it would have been consistent with his general philosophy to regard such interests as enforceable only *inter partes*.... The development of equitable remedies this century has widened the class of unregistered/unregistrable interests. This raises the question as to whether and to what extent provision should be made for the recognition and protection of such interests within the Torrens system.<sup>53</sup>

I would argue that given the primacy of the register in Torrens title land<sup>54</sup> and the importance of indefeasibility, (an idea very much at the core of what Torrens was proposing), that the question very much at the epicentre is what interests can/should be registered and of those remaining, which should be protected by caveat. In this discussion, two aspects must be noted at the outset. First, the purchaser is obtaining title by registration, the conferring of ownership results from the procedures of the system; second, the system has the opportunity to accord priority by virtue of the date of registration. In essence registration will permit what the lay person would describe as ownership to those interests which Parliament dictates should have that 'title'; whilst the caveating provisions can operate to afford priority to those interests worthy of protection in this manner. Flowing from this would be the recognition that, for priority purposes, interests need not be categorised as legal or equitable (and in this context it is important to note that it is impossible to categorise all equitable rights as mere equities or equitable

<sup>52</sup> Some of the better known decisions in this area include: *Heid* (1983) 154 CLR 326; *Butler v Fairclough* (1917) 23 CLR 78; *Person-to-Person Financial Services Pty Ltd v Sharari* [1984] 1 NSWLR 745; *Jacobs v Platt Nominees Pty Ltd* [1990] VR 146; *J & H Just (Holdings) Pty Ltd v Bank of New South Wales* (1971) 125 CLR 546; *AVCO Financial Services Ltd v Fishman* [1993] 1 VR 90; *IAC (Finance) Pty Ltd v Courtenay* (1963) 110 CLR 550. See also Hughson, Neave and O'Connor, above n 3.

<sup>53</sup> Hughson, Neave and O'Connor, above n 3, 462-3.

<sup>54</sup> On this point see the judgment of Barwick CJ in *Breskvar v Wall* (1971) 126 CLR 376, 385-6 where his Honour states 'the Torrens System of registered title...is not a system of registration of title but a system of title by registration. That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor.'

interests for all intents and purposes);<sup>55</sup> similarly the nexus between the common law 'old system' title and Torrens title would be ended. On this aspect, it can be noted that there are interests that, although considered legal under the general law system of title, would be unregistrable on the title of Torrens land.<sup>56</sup> Along these lines, the Victorian Law Reform Commission<sup>57</sup> and the Alberta Law Reform Institute<sup>58</sup> have both suggested that a system of registration and prioritisation of interests can be accommodated within the Torrens system. As stated by the Victorian body

[c]aveats should determine priority. Lodgment of a caveat before another person lodges a caveat or seeks registration should give priority to the [earlier] caveator. Failure to lodge a caveat before another person registers or protects their interest should postpone the interest.<sup>59</sup>

Indeed, in a number of jurisdictions the principle that lodging of the caveat determines priority is well established.<sup>60</sup>

The issue, however, is not finalised by the adopting of a provision that caveats should determine priority. The process must go further and recognise that in the case of Torrens title land the continuing relevance of a distinction between legal and equitable interests for determining property disputes cannot be maintained. As indicated some legal interests cannot be registered;<sup>61</sup> similarly equitable interests cannot be precisely categorised;<sup>62</sup> the myriad of priority rules and the numerous exceptions; for these reasons alone this distinction between law and equity could be abandoned. However, it is also appreciated that to abandon the distinction between law and equity for the resolution of priority disputes will need to be justified. Accordingly the next part of this article will consider the case law, academic and historical justification for an abandonment of this division.

<sup>55</sup> See the comments by David Wright, 'The Continued Relevance of Divisions in Equitable Interests to Real Property' (1995) 3 *Australian Property Law Journal* 163, 168. Wright questions the continuing relevance of the division between equitable interests, mere equities and personal equities.

<sup>56</sup> As stated by Sykes and Walker, above n 15, 452 'there are certain interests, which, without being expressly excepted or mentioned, fall outside the scheme of the Act in the sense that, although under the general law they would be legal in character, they are incapable of being placed on the register.' Examples provided include certain types of implied easements, certain types of interests created by will and short term tenancies. Questions have also surrounded the position of volunteers: see *King v Smail* [1958] VR 273; *Bogdanovic v Koteff* (1988) 12 NSWLR 472; *Medical Benefits Fund of Australia Ltd v Fisher* [1984] 1 Qd R 606; *State Bank of New South Wales v Berowra Waters Holdings Pty Ltd* (1986) 4 NSWLR 398. Hughson, Neave and O'Connor, above n 3, 469 also provide a list of legal and equitable interests that are incapable of registration. These include builders' charges, equitable charges, interests under a constructive trust, vendors' liens, purchasers' liens and the right of a registered proprietor to caveat against his or her own title.

<sup>57</sup> Victorian Law Reform Commission, *Priorities*, Report No 22 (1989) ('*Priorities*').

<sup>58</sup> Alberta Law Reform Institute, *Proposals for a Land Recording and Registration Act for Alberta*, Report No 69 (1993).

<sup>59</sup> *Priorities*, above n 57, [25].

<sup>60</sup> See the comments by Hughson, Neave and O'Connor, above n 3, 488. Reference there is made to a number of Canadian provinces and to Singapore.

<sup>61</sup> See the comments by Sykes and Walker, above n 15, 452. Also Hughson, Neave and O'Connor, above n 3, 469.

<sup>62</sup> See the comments by Wright, above n 55.

To do this will finally accord weight to the view of Maitland that 'lawyers will cease to inquire whether a given rule be a rule of equity or...common law.'<sup>63</sup>

## VI JUSTIFICATIONS FOR THE ABANDONMENT OF THE DIVISION BETWEEN LAW AND EQUITY

### A Case Law Justification

The difficulties in the application of the categories of legal and equitable interests has been recognised by the High Court:

there is no neat equation between legal and equitable interests on the one hand and unregistered instruments on the other. An instrument of transfer is not effectual of itself to vest in the transferee either a legal or equitable estate in the land.<sup>64</sup>

Similarly, in the context of priority disputes, the Court has recognised the conceptual confusion in determining the basis on which relief is provided.<sup>65</sup> Some judges have proceeded along the line of estoppel,<sup>66</sup> others have preferred an examination for the better equity,<sup>67</sup> whereas Murphy J. has considered that provided there is a causal link between the conduct of the first interest holder and the loss suffered by the second party then the second party will prevail – in essence a form of strict liability.<sup>68</sup>

This lack of consistency in what is or is not a legal or equitable interest, and the failure to have a common theoretical basis presents an opportunity to rethink this area anew. That is, it is time to recognise the real focus of the Torrens system – that its aim is to present a mirror of the title and provide recognition to those interests deemed worthy of registration. Other interests can be 'protected' by a method of caveating. To adopt this rule would allow the search, not for the better equity, nor for the representation relied upon to someone's detriment, but to focus on who registered or lodged his or her caveat first.<sup>69</sup>

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<sup>63</sup> Maitland, above n 2.

<sup>64</sup> *Corin v Patton* (1990) 169 CLR 541, 588 (Toohey J).

<sup>65</sup> See the judgment of the High Court in *Heid* (1983) 154 CLR 326, 339-40 (Mason and Deane JJ) that 'the theoretical basis for granting priority, in such circumstances, to the later interest has been the subject of debate. Some have found the basis in the doctrine of estoppel; others have identified a more general principle that a preference should be given to what is the better equity on an examination of the circumstances, especially the conduct of the owner of the first equity.'

<sup>66</sup> See the judgment of Gibbs CJ, with whom Wilson J agreed, in *Heid* (1983) 154 CLR 326, 335.

<sup>67</sup> *Mason and Deane JJ in Heid* (1983) 154 CLR 326, 341.

<sup>68</sup> See *Heid* (1983) 154 CLR 326, 346.

<sup>69</sup> It would also have the advantage of lessening litigation over disputes in this area. For example, the issue of priorities has been considered in a large number of cases. For a sample of some of the more recent see: *Bacon v O'Dea* (1989) 88 ALR 486; *Depsun Pty Ltd v Tahore Holdings Pty Ltd* [1990] 5 BPR 11, 314; *Classic Heights Pty Ltd v Black Hole Enterprises Pty Ltd* [1994] V ConvR ¶54-506; *Crampton v French* [1995] V ConvR ¶54-529; *George Biztote Corporation Pty Ltd* [1995] V ConvR ¶54-159; *Avco Financial Services Ltd v White* [1977] VR 561; *Chiodo v Murphy* [1995] V ConvR ¶54-531; *Troncone v Aliperti* [1994] 6 BPR 13,291.

Whilst the case law obviously does not provide explicit support for disregarding legal or equitable interests, what it does provide is implicit recognition of the unsatisfactory state of the present authorities. If the theoretical basis is shaky, the rationale for the manner in which present matters are considered must be seriously re-examined and questioned.

## B Academic Justification

The principal academic support for the argument that is being tendered centres on the idea of the use of the caveat procedure as a means to resolve priority disputes. The disputes surrounding priorities have been described as 'plagued by anomalous rules and by exceptions to them,'<sup>70</sup> as an area where the judiciary has been left to resolve the guiding policy for themselves,<sup>71</sup> where there is an urgent need for uniform principles relating to caveats and the effect of failure to lodge them,<sup>72</sup> and which 'will often involve two innocent third parties, for whom the time-based rules of priorities can have an arbitrary operation.'<sup>73</sup>

The ethos reflected in these comments is that the present system has failed to deliver the promise ascribed to it by Sir Robert Torrens.<sup>74</sup> A better system will deliver both registration (and thus in the layperson's eyes, ownership) and priority for the myriad of interests that can attach or be associated with land.<sup>75</sup> Thus, in the context of priority disputes, we must divorce the idea of separate bodies of law and equity and search for the interests that should be registered and those which should be protected by caveats. In doing this, it is imperative that consideration of legal and an equitable interests form no part of our thinking. To do this will only lead a retreat back into the morass of the competitive pressures between legal and equitable interests and their classification.<sup>76</sup>

## C Historical Justification

Law and Equity were developed from two separate court systems. Without wishing to enter an argument surrounding the fusion debate<sup>77</sup> it is reasonable to suggest that the *Judicature Acts* were designed, for all courts, to combine the features evident in the common law and the equitable courts. The Torrens system, which predated the *Judicature Acts*, was designed as a conveyancing system which

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<sup>70</sup> Tooher and Dwyer, above n 39, 56.

<sup>71</sup> Hughson, Neave and O'Connor, above n 3, 495.

<sup>72</sup> Marcia Neave, 'Towards a Uniform Torrens System: Principles and Pragmatism' (1993) 1 *Australian Property Law Journal* 114, 128.

<sup>73</sup> T D Castle, 'Caveats and Priorities: the Mere Failure to Caveat' (1994) 68 *Australian Law Journal* 143, 146. On this issue also see McCrimmon, above n 10, 301.

<sup>74</sup> See Robert Torrens, *The South Australian System of Conveyancing by Registration of Title* (1859). He wanted to have land transacted as quickly as dealings in merchandise or cattle.

<sup>75</sup> On this see generally McCrimmon, above n 10.

<sup>76</sup> As to what should be registered or protected by caveating is a question beyond the scope of this paper. For a discussion of how the number of interests affecting land was reduced in England see Bostick, above n 6.

<sup>77</sup> On this topic see Burns, above n 41.

was more reliable and efficient and less expensive than that provided by the general law or by the general law as modified by the registration of deeds legislation. The originators of the Torrens system believed that the defects of the older system sprang from two major causes: its reliance upon chains of title deeds and the operation of the doctrine of notice. Accordingly, the Torrens System substituted a register book for the chain of title deeds and, in favour of persons who registered their interests, it abolished the doctrine of notice.<sup>78</sup>

In the context of resolving priorities, if one is to take the features of a combined legal system resulting from the *Judicature Acts* and mix that with a new conveyancing system which was intended to be very different from its predecessors, the end result is surely a system of registration, not of legal or equitable, but simply of interests. By continuing this separation between legal and equitable through to priority disputes, we have allowed the goal of a cheap, safe and quick conveyancing system to be adulterated by historical divisions between law, equity, personal equities, mere equities, and equities coupled with a proprietary interests – divisions which are not consistent and need not be maintained.<sup>79</sup>

## D Practical Aspects

As a final point of justification for abandoning the division, computerisation of land title systems can allow the lodgment and immediate registration of interests created. This will permit the registration and recording system to operate more effectively and, interestingly, more in line with the objectives that Sir Robert Torrens envisaged in the 1860's.<sup>80</sup> Indeed a move to electronic conveyancing would necessitate in many respects the bringing about of many of the reforms suggested here.<sup>81</sup>

## VII CONCLUSION

*Since Torrens did not foresee the continuing vitality of equitable interests, his scheme gave little thought to how to reconcile the principle of the conclusive register with the need to protect holders of unregistered interests. In consequence, judges have been left to resolve the conflict and to determine the guiding policy for themselves.*<sup>82</sup>

A new land registration policy should be adopted to resolve priority disputes. The policy should be the abandonment of the distinction between legal and equitable interests (at

<sup>78</sup> Tooher and Dwyer, above n 39, 66.

<sup>79</sup> See generally Wright, above n 55. On the issue of personal equities and the Torrens system see *Snowlong Pty Ltd v Choe* (1991) 23 NSWLR 198; *Cottee Dairy Products Pty Ltd v Minad Pty Ltd* [1997] 8 BPR 15,611.

<sup>80</sup> Though as noted recently in *Imperial Bros Pty Ltd v Ronim Pty Ltd* [1999] Q ConvR 60,211 there are some dangers with an electronic conveyancing system when the computer system fails; noted by A Stickley, 'Unreliable Computers and Conveyancing: the Implications' (1999) 19 *The Queensland Lawyer* 173.

<sup>81</sup> A point implicitly recognised in the United Kingdom: see United Kingdom, *Land Registration for the Twenty-First Century* (Cmnd 4027, 1998) 250 ('*Land Registration*').

<sup>82</sup> Hughson, Neave and O'Connor, above n 3, 495.

least for the purposes of registered land) and to provide two forms of interests, registered and unregistered. Priority would be determined by the date of registration, or in the case of unregistered interests, by the date of caveating. This is supported by the recent report into Land Registration in the United Kingdom.<sup>83</sup> However it will only occur through legislative reform.

Much has been written about the aims<sup>84</sup> of the Torrens system,<sup>85</sup> but for our purposes we must consider what principles should now dominate current conveyancing practice. These can be identified as follows:

1. The title must be accurate, so that any purchaser can discover all facts that relate to the title and which may impinge upon the quality of title. In essence, there must be a mirror of title. However, in seeing this mirror we must ensure that the potential of the Torrens system is not undermined by the restrictions of past practices.
2. The conveyancing practice must be convenient and inexpensive, so that the trade in land can be easily completed – it should be no more complex than trade in securities on the Stock Market.<sup>86</sup>
3. An individual relying on a title should not be affected by any defects in the vendor's title and should not be required to search beyond the title.
4. The system must provide for compensation for those innocent parties affected by its operation.

In essence these principles are the same as those that prompted Sir Robert Torrens to devise the land registration system that bears his name. However, in the renaissance of equity we have seen an undermining of the objectives and policies of a system of title by registration. By recognising that the case law justification for the present resolution of priority disputes is unclear, that the academic view is that the caveating system can provide the rules to resolve contestability between unregistered interests, that the historical focus of the *Judicature Acts* was to provide for fusion of law and equity and finally, that computerisation permits the immediate lodgement and recording and registration of registered or unregistered interests, it can be seen that the time is ripe for an overhaul of the system. As we approach the millennium it is time to dispense with the notions of what is a legal or equitable interest in priority disputes, and provide instead for two categories of registered and unregistered (the latter being protected by caveat) and to

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<sup>83</sup> *Land Registration*, above n 81. This report considered that it is inevitable that there will be a system of electronic conveyancing introduced and flowing from this, it will not be possible to make transfers of land or to create rights in or over land except by registering them.

<sup>84</sup> See Neave, above n 72; Susan MacCallum, 'Uniformity of Torrens Legislation' (1993) 1 *Australian Property Law Journal* 135.

<sup>85</sup> On this topic see Hanstad, above n 37.

<sup>86</sup> Which can be completed electronically through the CHESS (Clearing House Electronic Sub-register System) though it is arguable that the checks necessary to ensure good 'title' to land are more detailed. In relation to land it may be necessary to undertake searches of the relevant council, mines department, bankruptcy records, corporate registers as well as the titles department, requisitions issued and finally, clarification of unregistered interests.

resolve these issues by the date of registration or recording. If this is to occur the conveyancing practice introduced with promise and hope will finally fulfil its role.





## ARTICLES

Lynden Griggs\*

### POSSESSORY TITLES IN A SYSTEM OF TITLE BY REGISTRATION

#### INTRODUCTION

[O]ne might be tempted to suggest abandonment of the concept of adverse possession as one of the relics of the past which seem to abound in Irish real property law – as a product of an age of violence and self help that has outlived its usefulness and has no place in a modern legal system.<sup>1</sup>

IN Australia, the law of adverse possession<sup>2</sup> has undergone considerable scrutiny in recent years.<sup>3</sup> It is not surprising, given the federal nature of the Australian political landscape, that this interest has been spawned by different stimuli. In Tasmania, this

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1 J Wylie, 'Adverse Possession: An Ailing Concept?' (1965) 16 *Northern Ireland Legal Quarterly* 467, 489.

2 The purpose of this article is not to examine what is meant by adverse possession. For an excellent summary of this see Anthony Moore, 'Adverse Possession' in *The Laws of Australia* ch 28:16, ch 3. The current limitation statutes are as follows: *Limitation Act 1969* (NSW); *Limitation of Actions Act 1958* (Vic); *Limitation of Actions Act 1974* (Qld); *Limitation of Actions Act 1936* (SA); *Limitation Act 1935* (WA); *Limitation Act 1974* (Tas); *Limitation Act 1985* (ACT).

3 Note that in 1966 the UK Law Reform Commission (Report No 14, Cmnd 3100, 1966) recommended that the principles of acquisition of easements and profits be equated with the principles of adverse possession. This call for reform was also picked up by David Jackson, 'The Legal Effects of the Passing of Time' (1970) 7 *Melbourne University Law Review* 407, 407 and 449.

interest was initially brought about by the decision in *Woodward v Hazell*.<sup>4</sup> The Supreme Court decision led to a government-initiated Law Reform Commission Report on adverse possession<sup>5</sup> and proposed amending legislation.<sup>6</sup> By contrast, in Victoria, the problems associated with the regularising of boundaries led to proposed amending legislation.<sup>7</sup> Unrelated to these Australian developments<sup>8</sup> was the United Kingdom report on Land Registration<sup>9</sup>, which included a detailed chapter on adverse possession<sup>10</sup> and moves to automate the conveyancing system.<sup>11</sup> These developments must be considered against the backdrop of a land conveyancing system that is based upon the importance of the register, and not principles of possession. In addition, the move towards full electronic conveyancing has highlighted the importance of substantive principles that recognise and correlate with the technology available, a technology that will emphasise the importance of the register and not a chain of title.<sup>12</sup> The purpose of this paper is to outline the developments noted in relation to adverse possession, to contrast the law reforms suggested in this area and to consider the possible introduction of electronic conveyancing and what it will (or should) mean for possessory claims.

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4 Unreported, Supreme Court of Tasmania, Underwood J, 17 March 1994.

5 Law Reform Commissioner of Tasmania, *Report on Adverse Possession and Other Possessory Claims to Land* (1995) 73.

6 Land Titles Amendment (Revision and Law Reform) Bill 1998 (Tas). It should be noted that at the time of writing the present Labor Government had not decided its policy in relation to this Bill, the Bill having been prepared under the auspices of the previous Liberal Government.

7 See Carlo Furletti and Douglas Trapnell, 'Adverse Possession of Torrens Land: Realigning the Boundary' (1999) 73(3) *Law Institute Journal* 76.

8 It can be noted that there was also a recent Supreme Court of Tasmania decision on prescriptive easements (*Wilson v Campbell*, unreported, Supreme Court of Tasmania, Underwood J, 29 October 1997), a topic allied in many ways to adverse possession. Indeed the Land Titles Amendment (Revision and Law Reform) Bill 1998 would in many ways treat a claim on adverse possession in the same way as a claim for a prescriptive easement.

9 UK Law Commission, *Land Registration for the Twenty-First Century: A Consultative Document* (Law Com No 254, Cm 4027, 1998).

10 Ibid Part X.

11 See Andrew Lang, 'Computerised Land Title and Land Information' (1983) 1 *Journal of Law and Information Science* 230. Queensland has also dispensed with the need for a paper version of the certificate of title: see their *Land Title Act 1994* ss 42–5.

12 For a general discussion of the principles behind the Torrens system, see Marcia Neave, 'Towards a Uniform Torrens System: Principles and Pragmatism' (1993) 1 *Australian Property Law Journal* 114.

## PRACTICAL SKETCHES OF ADVERSE POSSESSION CLAIMS

*Woodward v Hazell*<sup>13</sup>

The Woodward family acquired a farm of 658 acres in 1958. At this time, Calvert owned the adjoining property. On the western edge of the property was an irregularly shaped 37 acres. Part of this 37 acres was the subject of the court action. Calvert was given permission by the Woodwards to clear the block and use it for grazing. After this, 23 of the 37 acres were sold, leaving 14 acres physically separate from the rest of the Woodward estate. Calvert then erected fences around the 14 acres so as to suggest that this was part of his estate. In 1975, the plaintiff, a member of the Woodward family, acquired the Woodward land. Calvert's land was sold to the Hazell family trust which later passed to Wesley Hazell, the defendant. In 1982, Wesley Hazell took up residence on what was previously the Calvert property. Woodward did not discuss the ownership of the 14 acres with Hazell, nor did Woodward ever utilise the property for farming purposes. He occasionally entered the land for shooting expeditions. Woodward received an offer from a third party to purchase the land; this was declined, but Woodward did offer to sell the land to Hazell. Hazell offered \$4000 to purchase the 14 acres and this was declined.<sup>14</sup> After this Hazell claimed adverse possession of the land and applied to the Recorder of Titles based on exclusive uninterrupted possession of the 14 acres for the required 12-year period. Woodward then lodged a caveat and commenced proceedings to recover the disputed land.

His Honour Mr Justice Underwood considered that the overwhelming inference from the evidence was that the 14 acres had always been treated as if it were part of the Calvert's estate, and had been used by Hazell to the exclusion of all others. His Honour did however comment that:

One cannot escape some feeling of sympathy for the plaintiff in the position in which he found himself. Ignorant of the law of adverse possession, he believed that the land was his in accordance with the certificate of title and available for him to sell when the time was ripe. I think it fair to observe that Messrs D and W Hazell may also have experienced some sympathy for the plaintiff for prior to proceedings being commenced they offered the plaintiff some money for the land 'as we need to get on well together' but that offer, considerably less than the offer the plaintiff had been made by another, was not accepted.<sup>15</sup>

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13 Unreported, Supreme Court of Tasmania, 17 March 1994.

14 Interestingly, the English Court of Appeal in *Edginton v Clark* [1964] 1 QB 367, 376 held that an offer to purchase by an adverse possessor amounts to an acknowledgment of the better title of the true owner.

15 Unreported, Supreme Court of Tasmania, 17 March 1994, 4.

Other adverse possession scenarios that have been highlighted include the following:<sup>16</sup>

a) The former owner of Block A fences short of his boundary to avoid the problems of a nearby creek. The owner of the adjoining block dumps his refuse over the fence, there being no fence on Block B. Block A is sold and new owner wishes to fence in the proper location. The owner of Block B claims the land up to the old fence based on adverse possession.

b) A block of land was the subject of an original 1870 grant to a person with no living descendants. A squatter who is claiming the land under adverse possession presently occupies it. The matter is complicated by the alleged sale of the land by the neighbour who had occasionally entered upon the land. There is a current legal dispute between the squatter and the purported purchaser of the land.

c) A survey of Block A is carried out with the intent of constructing three units on the site. The survey reveals that the fence line is out by some 8–18 inches in favour of the adjoining block. Council approval has been obtained based on the survey information. In reliance on the survey, two units have been built on Block A, one of which is subject to an agreement to sell. The owner of Block B has put in an adverse possession claim. This has halted sale of the unit and the legal dispute has placed A in a difficult financial position.

What these examples demonstrate is that whilst a claim based on adverse possession may be the exception rather than the rule<sup>17</sup> it still forms part of the rich tapestry of land doctrines relevant to property law today.<sup>18</sup> But if we allow it to remain part of that rich tapestry does this result in conceptual confusion, given that the Torrens system of land holding is one of title by registration, or are the historical reasons for possessory titles still as valid today as they previously were?

<sup>16</sup> Law Reform Commissioner of Tasmania, above n 5, 21.

<sup>17</sup> However, evidence before the Commission indicated that there were more than 100 applications received each year: *ibid* 23. Recent discussion with the relevant officers in Tasmania indicated that the number had dropped to 37 for the 1998 calendar year. In Victoria, there were 198 applications in the 1996–97 financial year, with a further 115 between 1 July 1997 and 28 February 1998. See Furletti and Trapnell, above n 7, 78–9.

<sup>18</sup> Indeed, in one of the submissions to the Commission, the practical importance of conveyancing was noted when it was alleged that as many as one in twenty Hobart properties have problems with their boundaries and the ability to regularise them was an essential part of practical conveyancing: Law Reform Commissioner of Tasmania, above n 5, 22.

## THE HISTORICAL DEVELOPMENT OF THE PRINCIPLES RELEVANT TO ADVERSE POSSESSION

Discussion of the principles of squatting and adverse possession can be traced to the Code of Hammurabi of 2250 BC.<sup>19</sup> Section 44 stated: 'If a man rent an unreclaimed field for three years to develop it, and neglect it and do not develop the field, in the fourth year he shall break up the field with hoes, he shall hoe and harrow it and he shall return it to the owner of the field and shall measure out ten GUR of grain per ten GAN.'

Similarly, the Roman Empire did not permit the landowner to waste land. An individual was only permitted as much land as they could use themselves;<sup>20</sup> in an agrarian-based economy land was not to be under-utilised.

In comparison to these jurisdictions, the English developments are of more recent origin. They were first introduced following the decline of the feudal system.

The system of feudalism eventually decayed within two hundred years of its introduction by the Normans. In the fourteenth century, the rural middle class began to develop, and an economy based upon wages and not upon rendering services caused the death of feudalism and the birth of strong individual property rights in real property.<sup>21</sup>

Alongside this rise of individual property rights came the notion of free alienability of land.<sup>22</sup> The common law courts, in response to the need to avoid 'civil disorder',<sup>23</sup> focused on possession of land and chattels as the genesis of court jurisdiction. Indeed, early cases demonstrated that the law would protect the possessor against the person dispossessed even if it had occurred wrongfully and the dispossession had only occurred four days previously!<sup>24</sup> Gradually title became more important, although title depended on what was known as seisin.<sup>25</sup> To be the holder of seisin an individual had to be in possession of the freehold estate in the land – an equitable or leasehold interest was

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19 Noted in Brian Gardiner, 'Squatters' Rights and Adverse Possession: A Search for Equitable Application of Property Laws' (1997) 8 *Indiana International and Comparative Law Review* 119, 123.

20 *Ibid* 124.

21 *Ibid* 126.

22 As recognised in the *Statute of Quia Emptores 1290*.

23 See Marcia Neave, Chris Rossiter & Margaret Stone, *Sackville and Neave: Property Law Cases and Materials* (6<sup>th</sup> ed, 1999) 62.

24 *Ibid* 92.

25 For a discussion of what is meant by seisin see a series of articles by Frederic Maitland: 'The Seisin of Chattels' (1885) 1 *Law Quarterly Review* 324; 'The Mystery of Seisin' (1886) 2 *Law Quarterly Review* 481; 'The Beatitude of Seisin' (1888) 4 *Law Quarterly Review* 24 and 286.

insufficient.<sup>26</sup> Whoever had the earlier and better seisin was entitled to priority, and possession was an important characteristic of seisin. The original English legislation sought to make title more certain by permitting action to recover land if the owner was able to show seisin at the time of the King's last voyage to Normandy.<sup>27</sup> Later legislation set the limitation dates at the time of Henry III's first trip to Gascony,<sup>28</sup> and then the coronation of Richard I.<sup>29</sup> The latter limitation 'date' (3 September 1189) operated for some 265 years. Subsequent Acts then defined the limitation period by reference to time limits; in the first instance this was set at 3 score years.<sup>30</sup> Legislation up to this point in time did not extinguish title, however; rather it prevented the person dispossessed from succeeding in an action for ejectment. It was the *Statute of Limitations 1623* which introduced the principle that, if a person had been in possession of land for a certain period, the owner was not only barred from bringing the action, but also title was transferred to the adverse possessor. This legislation, which had the purpose of 'avoiding of suits' and 'quieting of man's estates', provided a 'framework for decreasing the often high transaction costs associated with land disputes, and provided for greater economic development based on the new certainty of title'.<sup>31</sup> This sixty-year period was then shortened to twenty years<sup>32</sup> and subsequently to twelve years.<sup>33</sup> These later nineteenth century developments were ultimately enacted into Australian jurisdictions.<sup>34</sup> Today, in Australia the limitation period is either 12 or 15 years.<sup>35</sup>

Given this historical development, and if one considers that the original purpose of this type of legislation was to provide for greater economic development and to prevent the high cost of land disputes, can we say today that there are the same contemporary justifications as we approach the twenty-first century? Or, as noted:

If in fact the original purpose of the rule of adverse possession was to quieten disputes, the relative lawlessness of 17th century England is surely not comparable to [Australian] social circumstances at the outset of the

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- 26 See Sandra Petersson, 'Something for Nothing: The Law of Adverse Possession in Alberta' (1992) 30 *Alberta Law Review* 1291, 1296.
  - 27 As noted in the Tasmanian Law Reform Commission paper, above n 5, 16.
  - 28 28 October 1216, as indicated in the *Statute of Merton 1236* 21 Hen III, c 8.
  - 29 3 September 1189, as indicated in the *Statute of Westminster I 1275* 3 Edw I, c 39.
  - 30 *Act of Limitation with Proviso 1540*.
  - 31 Gardiner, above n 19, 127.
  - 32 *Real Property Limitation Act 1833*.
  - 33 *Real Property Limitation Act 1874*.
  - 34 The modern legislation is *Limitation Act 1969* (NSW); *Limitation of Actions Act 1958* (Vic); *Limitation of Actions Act 1974* (Qld); *Limitation of Actions Act 1936* (SA); *Limitation Act 1935* (WA); *Limitation Act 1974* (Tas); *Limitation Act 1985* (ACT).
  - 35 The period of limitation in Victoria and South Australia being 15 years, and Queensland, Western Australia, Tasmania and New South Wales, 12 years. On adverse possession, see *Land Titles Act 1994* (QLD) s 185(1)(d); *Real Property Act 1886* (SA) ss 251, 80a–80i; *Transfer of Land Act 1958* (Vic) s 42(2)(b); *Transfer of Land Act 1893* (WA) s 68; *Real Property Act 1900* (NSW) Pt VIA.

21st century. As expressed ... '... the present situation is completely wrong and unfair; adverse possession ... is out of touch with the reality of the late 20th century'.<sup>36</sup>

What then are the justifications for the doctrine of adverse possession? These will be briefly considered.<sup>37</sup>

### *A Adverse Possession Protects Against Stale Claims*

The purpose of the limitation statutes is so that people do not 'sleep' on their rights, so that there is some finality to the potential of the litigation process.<sup>38</sup> To this end it must always be remembered that adverse possession operates further than mere denial of a claim: it positively effects a change in ownership. 'A squatter does in the end get a title by his possession and the indirect operation of the [Limitation] Act and he can convey a fee simple.'<sup>39</sup>

### *B Adverse Possession Provides a Remedy Where the True Owner has Disappeared*

If there were no doctrine of adverse possession, there would be no mechanism to 'regularise' ownership if the person holding title could not be located or had disappeared. Without adverse possession, the property may become unmarketable.<sup>40</sup>

### *C Adverse Possession Assists in Those Situations Where There are 'Off the Register' Dealings*

In these situations the register will not reflect the actuality if there is a transaction which, possibly because of the desire to avoid stamp duty, is conducted without due formalities.<sup>41</sup>

36 Law Reform Commissioner of Tasmania, above n 5, 25.

37 More detailed consideration of this aspect can be found in David Irving, 'Should the Law Recognise the Acquisition of Title by Adverse Possession?' (1994) 2 *Australian Property Law Journal* 112; Gardiner, above n 19; Martin Dockray, 'Why do we Need Adverse Possession?' [1985] *The Conveyancer and Property Lawyer* 272; Michael Goodman, 'Adverse Possession of Land: Morality and Motive' (1970) 33 *Modern Law Review* 281.

38 See the comments by the UK Law Commission, above n 9, 204.

39 *Fairweather v St Marylebone Property Co Ltd* [1963] AC 510, 535.

40 UK Law Commission, above n 9, 205.

41 See the comment in Tasmanian Law Reform Commissioner, above n 5, 23: 'Not infrequently in this State, people agree to sell land, and money is paid, without the legal formalities being evidenced in writing and stamp duty and other taxes being paid. These informal sales (or "pub sales") can be regularised by an application under the rule of adverse possession.'

### *D Adverse Possession can be Used to Prevent Hardship*

Hardship may result to the adverse possessor where they have, for example, 'innocently' mistaken their boundaries and made significant improvements to the land over a period of time. While proprietary estoppel may provide some remedy, this will not always be the case.<sup>42</sup> Indeed the regularising of boundaries has been seen as a critical factor in favour of the retention of adverse possession.<sup>43</sup>

### *E Adverse Possession is Just an Example of Possessory-Based Titles*

As previously noted, historically title to land is relative and dependent upon possession. Adverse possession therefore is just an example of the concept of possession and its importance to realty.<sup>44</sup>

These justifications can be met with varied responses: that the law is unjust and operates to favour the dishonest;<sup>45</sup> that today Australia has a different social environment to England of the late eighteenth century and the principles are no longer valid;<sup>46</sup> that the innocent purchaser of land is at risk of losing their interest to an adverse possessor;<sup>47</sup> and, I would submit most importantly, that the doctrine of a title based upon possession is contrary to the policy, direction and the very soul of a system of land ownership based upon title by registration.<sup>48</sup>

### THE RECOMMENDATIONS OF THE TASMANIAN LAW REFORM COMMISSION<sup>49</sup>

The Tasmanian Law Reform Commission concluded that the rule of adverse possession needed to be clarified and restricted so that fair dealings in land could be promoted and

<sup>42</sup> See the comments by the UK Law Commission, above n 9, 205.

<sup>43</sup> Law Reform Commissioner of Tasmania, above n 5, 22: 'The rule of adverse possession allows inaccurate property descriptions to eventually be cured by the passage of time. ... This argument was highlighted and supported by many senior legal practitioners experienced in property matters who submitted that the rule should be retained because of its usefulness in resolving problems with boundaries.'

<sup>44</sup> 'Property rights are relative, and rarely absolute. An owner of land may be challenged in relation to the possession of his or her land if another person can prove better title against the true owner. In this respect adverse possession is not an anomaly within property law but an extreme example of the general principle that the title held by an owner of land is relative to the claims of others.' Ibid 23.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid 25.

<sup>47</sup> Ibid 24.

<sup>48</sup> Ibid 25: 'Registration is the key to ownership under the Torrens system, which has removed the importance of possession as the basis for title to land.'

<sup>49</sup> The proposed legislation substantially followed the recommendations of the Law Reform Committee. See Land Titles Amendment (Revision and Law Reform) Bill 1998 (Tas).



injustice prevented.<sup>50</sup> The Commission's recommendations would also assist in ensuring the supremacy of the register. Whilst the doctrine of adverse possession would be retained, it would be limited so that the bona fide purchaser for value is protected against any adverse possession claim that accrues before the purchaser acquires title to the land.<sup>51</sup> Crown and council land would be made exempt from any claim.<sup>52</sup> The period of limitation would be extended to fifteen years<sup>53</sup> and notice of any claim would be published as widely as possible.<sup>54</sup> It was also recommended that the evidence required to establish any claim should be particularised<sup>55</sup> and that, instead of requiring a costly Supreme Court hearing to resolve the matter, the Recorder of Titles be authorised to conduct a 'hearing' into an adverse possession claim.<sup>56</sup>

The essential tenets of the Tasmanian recommendations were: first, an attempt to greatly restrict the operation of the rule; second, to protect purchasers in good faith; and third, to permit the Recorder to undertake the investigation.

#### THE RECOMMENDATIONS OF THE UK LAW COMMISSION

The English body focused more closely on the relationship of adverse possession to a system of registered title, and always kept the development of electronic conveyancing in mind. To this end, the principles underpinning its ideas were that:

- adverse possession should not of itself bar the title of a registered proprietor;
- only the closure of that proprietor's title on the register would have that effect; and
- the principles governing adverse possession would be clarified and strengthened considerably in favour of the dispossessed owner.<sup>57</sup>

A person seeking adverse possession would undertake the following steps. First, an applicant with ten years adverse possession could seek to be registered as a proprietor. Relevant people would then be informed of the application. If any of the relevant people, including the registered proprietor, failed to object within two months, the applicant would

50 Law Reform Commissioner of Tasmania, above n 5, 31.

51 Ibid 32.

52 Ibid. In South Australia, the period of limitation against the Crown appears to be 60 years: *South Australian Co v City of Port Adelaide* [1914] SALR 16. In NSW, the period of limitation is 30 years: *Limitation Act 1969* (NSW) s 27; in Victoria, Queensland and WA there can be no adverse possession against the Crown: *Limitation Acts* ss 7, 32; s 6; s 36 respectively.

53 Law Reform Commissioner of Tasmania, above n 5, 33.

54 Ibid.

55 Ibid.

56 Ibid.

57 UK Law Commission, above n 9, 230.

be registered. If however the registered proprietor objected, the application would be dismissed unless the proprietor were estopped by his or her conduct from objecting to the registration, the applicant had some independent right to be registered as proprietor or the applicant had entered into adverse possession under a mistaken belief, reasonably held, as to their rights.<sup>58</sup>

If the applicant raised any of these matters, the registrar would make a final adjudication. If the adverse possessor established that they had a mistaken belief as to their rights, a belief reasonably held, the registrar would be entitled to make an order that was equitable between the parties. This could include the payment of compensation, or the granting of appropriate easements or covenants.<sup>59</sup>

Further provisions provided that, if the application of the adverse possessor was rejected and they remained in possession for a further two years, they could then re-apply to be registered.<sup>60</sup> If the registrar was satisfied of this further two-year holding the adverse possessor would be registered as proprietor and close the title of the existing registered proprietor.<sup>61</sup> The onus in this situation is placed on the existing registered proprietor to act to recover possession after being notified of the claim.

Underpinning the justification for the changed laws is the idea that, conceptually, possessory titles have no place in a system of title by registration.

The main weakness of the present law is that the principles which determine whether a registered proprietor will lose his or her title by adverse possession were developed for a possession-based system of title and not one founded on registration. If a system of registered title is to be effective, those who register their titles should be able to rely upon the fact of registration to protect their ownership except where there are compelling reasons to the contrary. *All that should be required of them is to keep the Registry informed of their address for service.*<sup>62</sup>

To this end, the proposed reforms in England more strongly emphasise the register and its importance; a title based on adverse possession would only take effect upon registration and would have no effect whilst still only a possessory title.<sup>63</sup> The second critical aspect is that the reforms suggest compensation or the provision of easements and covenants to

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58 Ibid 230–1.

59 Ibid 231.

60 Ibid.

61 Ibid.

62 Ibid 206 (emphasis added).

63 The committee did not address the possibility of bequeathing the possessory title or, for example, of protecting the property by taking action based on the possessory title against trespassers. Certainly, the tenor of the report is that no interest was obtained until registration.

provide a more equitable solution to the dispute between the adverse possessor and the registered proprietor.<sup>64</sup>

### ELECTRONIC CONVEYANCING AND THE TORRENS SYSTEM

What are the goals that we seek to achieve in a conveyancing system? Five could (and have) been identified.<sup>65</sup> These are that the system must be reliable, accurate, low cost, quick and suitable to society at that time. Indeed these requirements are as relevant today as they were in the time of Sir Robert Torrens.<sup>66</sup> The very advent of the technology in no way lessens these requirements or policy imperatives; indeed it presents the very opportunity to ensure that they are met. Using a typical, simple transaction as a template, an outline of the common conveyance is provided. This will provide a framework from which the use of electronic conveyancing can be discussed.<sup>67</sup>

A property is offered for sale, by either auction or private treaty. The purchaser then makes an offer by way of signing the standard form contract of sale, or, as in NSW, an exchange of contracts will occur. This offer is then put to the vendor, who may agree, thus finalising the matter, or may make a counter offer. This continues until both parties have agreed on the terms of the contract. A copy of the contract is then forwarded to the solicitors of the vendor and purchaser. The solicitors for the purchaser then lodge a priority notice, settlement notice or caveat, depending on the jurisdiction.<sup>68</sup> This provides some measure of protection for that particular transaction. The solicitors for the purchaser then undertake a raft of searches. This may include the following: a title search, inquiries of the mines department, possible searches of bankruptcy and corporate affairs records, council inquiries, queries sent to the electricity authorities, requisitions sent to the vendor, inspection of the property (usually undertaken by the purchaser), and possibly a survey of the property. The memorandum of transfer is then executed, monies obtained and the matter proceeds to settlement, often with a check of the title undertaken just before settlement. Generally, the mortgagee will attend to registration post-settlement.

Two particular problems evident in this system are: first, there is a delay between the signing of the contract<sup>69</sup> and settlement; and second, there is a gap between settlement and registration.

64 UK Law Commission, above n 9, 231.

65 See Sandra Birrell, John Barry, Denis Hall and John Parker, 'Is the Torrens System Suitable for the 21st Century?' (Paper delivered to 1995 New Zealand–Australia Cadastral Conference, '2010: A Vision').

66 See Robert Torrens, *A Handy Book on the Real Property Act of South Australia* (undated).

67 For a more detailed analysis of what occurs, see Neave, Rossiter and Stone, above n 23, 424–9.

68 In Tasmania it will be a priority notice; in Queensland, a settlement notice; in the other jurisdictions, a caveat.

69 There is also the critical problem that purchasers rarely obtain legal advice prior to signing the contract. This particular issue and the problems it brings are beyond the province of

These delays significantly increase risk. There is no doubt that the longer a transaction remains unsettled the greater the risk.<sup>70</sup> Further, the existence of paper copies of the folio of the register (ie the certificate of title) leaves open the potential for abuse, for loss or for theft. There is no doubt that if the time between transaction and registration was eliminated or reduced (the so-called 'registration gap')<sup>71</sup> the potential for error or default would be minimised. Similarly, if the certificate of titles were eliminated the potential for loss or fraud would be reduced.

The ghosts of the last century remain in [the] continued requirement of signed and witnessed paper instruments. The electronic conveyancing of the next century must address this issue. The answer may be found in an expanded concept of agency in which agents are authorised to complete the transaction on behalf of the parties. Perhaps authorised classes of customers should be responsible for updating the Register. This solution would require a combining of the present separate roles of settlement and registration. The paperless transaction system of the Australian Stock Exchange may point the way.<sup>72</sup>

The other difficulty in this period of the 'registration gap' is that the interests created operate in equity. As we have seen, many of the disputes governing priorities revolve around equitable disputes.<sup>73</sup> Indeed the opposition of Sir Robert Torrens to equitable interests was well known; he considered that interests should not pass until registration, and that before this it was a matter of mere personal contract.

Instruments when executed are merely personal contracts between the parties, upon which action for damages may be raised, but they do not bind the land. The entry on the folium of the Register alone passes the property, creates the charge or lesser estate, discharges, or transfers it.<sup>74</sup>

The advantage that electronic conveyancing can offer is that, in an ideal conveyancing system, execution, registration and settlement could occur in one instant. How can this be

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this paper. See Diane Skapinker, 'A Different Perspective on Defects in Title and Quality' (1994) 2 *Australian Property Law Journal* 231; Eileen Webb, 'Has Caveat Emptor Become Vendor, Lessor and Agent Emptor: Silence, s 52 of the Trade Practices Act 1974 (Cth) and Real Property Transactions' (1995) 3 *Australian Property Law Journal* 122.

70 By analogy, it should be noted that the Stock Exchange has of course adopted an electronic system of transfer, settlement being required within three days of the transaction occurring.

71 See UK Law Commission, above n 9, 251.

72 Birrell et al, above n 65, 3.

73 Just some of the well known High Court or Privy Council cases are *Breskvar v Wall* (1971) 126 CLR 376; *Heid v Reliance Finance Corporation Pty Ltd* (1983) 154 CLR 326; *Abigail v Lapin* [1934] AC 491; *J & H Just (Holdings) Pty Ltd v Bank of New South Wales* (1971) 125 CLR 546.

74 Torrens, above n 66, 8.

done?<sup>75</sup> First, and ideally, all searches would be undertaken before entering the contract. Now this is too inconvenient, costly and time-consuming to achieve. However, if all searches relating to land could be accessed from the one terminal for a small or nominal fee, purchasers would be more likely to undertake these searches before entering the contract.<sup>76</sup> This would permit the contract to be unconditional,<sup>77</sup> though of course it is recognised that in many cases the purchase of a house will have the conditions precedent of the sale of one's own house and/or the obtaining of finance. Upon these conditions being met, the settlement and registration could proceed simultaneously, carried out by recognised or accredited professionals with access to the register. Even if the contract were not unconditional, it 'might well prove to be possible to ensure that both the exchange of the parts of the contract and its registration were effected electronically and would be simultaneous'.<sup>78</sup>

[The] eventual goal is to eliminate so far as possible the present three-stage process by which a document is executed, lodged with the Registry and then registered. The only way to achieve this is to provide that the transaction should be executed electronically by registration. Thus any transfer would be completed by registering it, and any right that it was intended to create over registered land would not be created until it was registered. This is only possible with an electronic system.<sup>79</sup>

The advantages that this system would bring are obvious. Conveyances would be quicker and cheaper.<sup>80</sup> The problem of the registration gap would be eliminated<sup>81</sup> and disputes governing equitable interests would be minimised.<sup>82</sup> An electronic system would also make a National Land Register system possible with the cost savings that that would allow.<sup>83</sup>

The future vision: a national datum, a national surveying code, a national land Register, and national land registration legislation. The results: a seamless surveying system, a common Torrens system, and possible cost

75 Readers would appreciate that the comments here can only be speculative at best.

76 Of course, the purchaser having undertaken the searches before entering the contract would alleviate many disputes concerning defects in title. On this topic, see the articles cited above n 69.

77 Many jurisdictions are now moving towards a fully automated land information system. See the comments by Neave, Rossiter & Stone, above n 23, 424.

78 UK Law Commission, above n 9, 254.

79 Ibid 253.

80 Ibid 256.

81 Ibid.

82 Indeed if the electronic system is accompanied by paperless transactions many of the priority disputes should no longer occur.

83 On this topic see Susan MacCallum, 'Uniformity of Torrens Legislation' (1993) 1 *Australian Property Law Journal* 135.

savings. The current reality: state datums, state surveying codes, state land Registers, and state land registration legislation. The results: conflicts between surveying systems, competition between the states to be the best, fragmented land Registers and high running costs to operate. We are living in an environment of national markets and mutual recognition yet we still operate eight varieties of the Torrens system. Australia is one country, we need one datum, one survey code and one land Register.<sup>84</sup>

Obviously, an electronic system should also allow for much quicker conveyancing. The various professionals involved in land registration, such as legal practitioners, real estate agents and surveyors could be required to be linked into a central database. Similarly, those entities which impact upon the title to land, such as the mines department, councils, corporate affairs bodies and utility authorities could all access a database linked to a central mainframe. The checks and searches should be able to be carried out far more quickly, and, as previously indicated, in an ideal system completed before entry into any contract.<sup>85</sup>

Having espoused the possibilities of an electronic system, what are the concerns? First, it must be secure.<sup>86</sup> There would need to be some system which would accredit or recognise those with access and exclude the unauthorised. Some form of encryption technique or digital signatures may be required.<sup>87</sup> The system would also need to be accurate.<sup>88</sup> To this end, appropriate software would need to be developed. There would also need to be back-up systems or available and experienced personnel to deal with any system failure. All readers are no doubt aware of the dangers caused by computer error or failure, and in the commercial setting this obviously needs to be minimised.<sup>89</sup>

To these factors I would add that the system must be quick. We are all frustrated by the inability of computer software to respond as quickly as we would like. The appropriate funding must be provided and maintained to ensure that electronic conveyancing in a Torrens system succeeds.

Electronic conveyancing has the potential to succeed. Importantly, in many ways, the principles of Sir Robert Torrens of a 'cheap, simple, expeditious and accurate system of transfer of land',<sup>90</sup> are more readily and easily accommodated in this time of electronic transmission than, I suspect, 140 years ago.

84 Birrell et al, above n 65, 5.

85 See the comments by Birrell et al, *ibid*.

86 UK Law Commission, above n 9, 256–7.

87 See Adrian McCullagh, Peter Little and William Caelli, 'Electronic Signatures: Understand the Past to Develop the Future' (1998) 21 *University of New South Wales Law Journal* 452; Patrick Fair, 'Gatekeeper: Setting Australia's Standard for Online Security' (1998) 1 *Internet Law Bulletin* 1.

88 UK Law Commission, above n 9, 257.

89 *Ibid*.

90 Torrens, above n 66, 11, quoting Lord Brougham.

In the approaching century we can expect to see the on line electronic lodgement of all plans and land transfer instruments, remote computer title searches, ... a system less prone to fraudulent activity through the removal of the duplicate title, national surveying codes and a number of other changes. The Torrens system must undergo reforms to keep pace with changes in society.<sup>91</sup>

Electronic conveyancing,<sup>92</sup> as indicated, has the potential to support the foundations of a land system where the register is a mirror of the title. Off-site lodgement and searches will allow individuals accuracy and a speed hitherto unknown. Similarly the lack of paper represents an opportunity for security not presently apparent. The security, stability and accuracy of the register are even more critical and more available today than ever before.

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91 Birrell et al, above n 65, 6.

92 Ontario has enacted legislation governing electronic lodgement: see *Land Registration Reform Act 1990*. The Act sets the framework for what must be resolved before electronic lodgment and searching can be made. For example s 29 states:

The Director may

- (a) approve the electronic format for electronic documents submitted under the *Land Titles Act* or the *Registry Act* and approve the manner of their completion;
- (b) establish rules, procedures and guidelines respecting the delivery of electronic documents by direct electronic transmission and require that electronic documents be delivered by direct electronic transmission;
- (c) authorize persons or classes of persons to submit documents in an electronic format and establish conditions and requirements for becoming an authorized person;
- (d) authorize persons or classes of persons to deliver electronic documents by direct electronic transmission and establish conditions and requirements for becoming an authorized person;
- (e) establish the manner in which persons who are authorized to deliver documents by direct electronic transmission shall access the electronic land registration database and the manner in which authorization shall be assigned for that purpose;
- (f) establish the manner in which supporting evidence shall be included in an electronic document submitted ... and approve the electronic format for the supporting evidence;
- (g) provide for the information to be included in an electronic document;
- (h) provide for the locations in which electronic records may be maintained;
- (i) provide for the location form in which the electronic records may be accessed and the time and manner in which they may be accessed;
- (j) establish rules, procedures and guidelines governing searches of electronic records;
- (k) authorize persons or classes of persons to search the electronic records and establish conditions and requirements for becoming an authorized person.

The Torrens system must operate so that the expectations of the community are met.<sup>93</sup> To this end the community would agree with the dictates of Sir Robert Torrens that the system must be cheap, reliable, secure and quick. It is submitted that this can only be achieved by the recognition of the primacy and importance of the register and by the encouragement by the state of the importance of the register. Indeed, it is in the interests of the state to have an accurate register, given the compensation provisions of the Torrens legislation.<sup>94</sup> The predominant system of conveyancing is one of title by registration, not registration of title.<sup>95</sup> Given this, it is important that we free the system of historical notions of seisin and possessory title. Accordingly, the 'application of the principles of adverse possession to registered land [must be] technically sound and coherent, and ... free from the faults that mar the present law'.<sup>96</sup>

#### THE CONCEPT OF ADVERSE POSSESSION IN A SYSTEM OF TORRENS-BASED ELECTRONIC CONVEYANCING.

The first question that must be addressed is whether there is any place at all for possessory-based titles, such as adverse possession (and, for that matter, prescriptive easements).<sup>97</sup> Would it be simpler and more conceptually sound just to disallow claims based upon possession? Furthermore, in an age of electronic conveyancing, with the greater role and increased capabilities of the register, should not possessory titles be rendered obsolete? The initial response to these questions is yes. The criticisms of the adverse possession rule, its basis in a different historical context, its inconsistency with the notion of the Torrens system, and the unjustness it can produce, all amount to a persuasive argument that it should be abandoned. However, it has been demonstrated that there is a

clear division of opinion between, on the one hand, members of the public who expressed the view that the rule of adverse possession should be abolished, and, on the other hand, many solicitors, ... some surveyors and members of the public who expressed the view that the rule should continue to apply.<sup>98</sup>

93 See the comments by Joyce Tooher, 'Jubilant Jamie and the Elephant Egg: Acquisition of Title by Finding' (1998) 6 *Australian Property Law Journal* 117, 137: 'Legal principles work more effectively where they reflect the expectations of the parties and approximate an outcome that the parties themselves might have agreed had they contractualised their arrangement beforehand.'

94 For example, in Tasmania see *Land Titles Act 1980* ss 150–9.

95 To paraphrase Barwick CJ in *Breskvar v Wall* (1971) 126 CLR 376, 385.

96 UK Law Commission, above n 9, 221.

97 It should be noted that under the Land Titles Amendment (Revision and Law Reform) Bill 1998 (Tas) the law relating to prescriptive easements would largely be assimilated with that of adverse possession.

98 Law Reform Commissioner of Tasmania, above n 5, 26.



Given this division of opinion, and no doubt the view of legal practitioners and surveyors is influenced strongly by the need to regularise boundaries,<sup>99</sup> are there any alternatives to adverse possession, that would allow the doctrine to be modified or abolished (as has occurred in the ACT,<sup>100</sup> the Northern Territory,<sup>101</sup> Saskatchewan,<sup>102</sup> British Columbia<sup>103</sup> and Ontario<sup>104</sup>) but still provide an equitable solution to the problem of incorrect boundaries? What alternatives would ensure consistency so that recognition of the true nature of the Torrens system can be fully realised: that of a system of title by registration and not registration of possessory titles?

One initial approach could be to ensure that the compensation provisions are amended so that it is made clear that the Assurance Fund will compensate for incorrect boundaries. As Birrell et al ask:

Do the State guarantee and the associated Assurance Fund cover incidents such as *incorrect or inaccurate boundaries*? This topic could be debated well into the time when GPS takes over and coordinates are everything and still it would not be resolved. The extent of the State guarantee in relation to incorrect boundaries has not been tested in the Victorian courts.<sup>105</sup> For a topic that we place such an enormous importance on, we know very little about it. This is a major issue facing the Torrens system as the 21st century approaches.<sup>106</sup>

Secondly, the advent of electronic conveyancing will permit the abolition of paper titles.<sup>107</sup> This should go some way towards protecting against fraud, and will further the aims of the Torrens system, by providing an incentive to check the register, thus increasing the importance of judicial recognition of reliance on it.<sup>108</sup>

Thirdly, we should aim towards a national land database and uniform Torrens legislation. Again this would lower cost, and, given that the States and Territories differ markedly in their approach to adverse possession, provide consistency to this vexed area. This

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99 Ibid 22.

100 *Limitation Act 1985* s 5.

101 *Real Property Act* s 251.

102 *Land Titles Act* s 71(2).

103 *Limitation Act 1975* s 12.

104 *Land Registration Reform Act 1984*.

105 On this topic see generally *National Trustees Co v Hassett* [1907] VLR 404; *Dempster v Richardson* (1930) 44 CLR 576.

106 Birrell et al, above n 65, 3.

107 It must of course be recognised that at any point in time the certificate of title and the folio of the register may not correlate. For example caveats may have been lodged against title, but do not appear on the certificate. A search of the register is the only way to achieve with certainty an apposite level of knowledge of what is on the title.

108 Contrast *Abigail v Lapin* [1934] AC 491; [1934] All ER 720.

consistency would be assisted by the abolition of the doctrine or alterations in line with those proposed in the United Kingdom, proposals that also deal with the category of cases involving 'off the register' dealings in which considerable hardship would be imposed if the possessory title was not recognised.

If it is accepted that the Torrens system is based on registration, non-acceptance of any possessory-based title must be one of the starting points for an understanding of this legislation and its purposes. Having done this, and moving inexorably towards electronic conveyancing, as a society we increase the recognition and importance of the register. If the law is the 'product of compromise'<sup>109</sup> then the approach to adverse possession undertaken by the UK Law Commission is to be preferred to that of the reforms suggested elsewhere. The English Commission worked from a principle of primacy of the register and then developed adverse possession to fit within this concept, rather than looking at how adverse possession may fit within a system of title by registration. Similarly, the advent and development of electronic conveyancing was at the forefront of the English Commission's report.<sup>110</sup>

The acquisition of title by adverse possession 'is inconsistent with the basic philosophy of the Torrens system, in that it permits the acquisition of rights not recorded in the Register and gives such rights priority over the existing title as recorded in the Register'.<sup>111</sup> This inconsistency is highlighted further by electronic conveyancing and the advantages that it can bring. We should not weaken indefeasibility further by adding another exception.<sup>112</sup>

### CONCLUSION

The dominant system of land titles in Australia is that of the Torrens system. In many respects, it bears no relationship to the general law, or to the old system of title that preceded it. In the 140 or so years since its introduction, the concept of possessory title (so very important to the English notion of seisin) has continued to play a part in weakening, or modifying, the principles of title by registration devised by Sir Robert Torrens. As we approach the new century, it is timely to reflect on those ideals of reliability, simplicity, low cost, speed and suitability<sup>113</sup> and how the technology of today can finally fulfil the promise or expectation of 140 years ago. To this end, possessory titles have no role to play. To allow them to remain only retains the conceptual confusion between a land system based on possession and one based on registration. Adverse possession, essentially an unjust doctrine which on occasions militates against hardship, is inappropriate in its potential to undermine the workings of the Torrens system. Electronic conveyancing raises

109 Irving, above n 37, 117.

110 As indicated by its title, *Land Registration for the Twenty-First Century*. In particular see Part XI of the report.

111 R A Woodman and Peter Butt, 'Possessory Title and the Torrens System in New South Wales' (1980) 54 *Australian Law Journal* 79, 79.

112 Contrast the comments by Irving, above n 37, 112.

113 Birrell et al, above n 65, 1.

the potential and importance of the register to a level not presently seen. Critically, the substantive law behind this development must reflect the expectations of the general community at the start of the twenty-first century. These expectations were not met by the result of *Woodward v Hazell*.<sup>114</sup> They reflect the ideal that the person named on the folio of the register, the individual paying the rates and taxes, should be entitled to assert title. To the extent that the doctrine of adverse possession militates those cases of hardship dealing with boundary disputes and ‘off the register’ dealings it can be supported. However, and in conclusion, with the advent of electronic conveyancing and the potential it brings, reform to the law of adverse possession is paramount and, to this end, the suggestions of the UK Law Commission are to be supported. In contemporary Australian society, adverse possession should be relegated to historical irrelevance.

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114 Unreported, Supreme Court of Tasmania, 17 March 1994.

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## Torrens Title in a Digital World

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**Issue:** Volume 8, Number 3 (September 2001)

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### Introduction

1. There is no doubt that one of the defining features of conveyancing practice in the 21st century will be the utilization of electronic means to lodge data, to register dealings and to record changes to title. This impetus is demonstrated by the move in the last twenty years to electronic record keeping. For example, in New South Wales, 98.5% of all titles had been computerized by mid 1999.[1] with the intent that all services will be available electronically by the end of 2001.[2] Similar sentiments have been echoed in Queensland.[3] Indeed, as noted by Cocks and Barry[4] discussion of this means of transferring title to land cannot be considered a recent development.[5] However, it is the advances in computer software that has allowed the greater utilization of this technology to assist conveyancers in processing transactions. Furthermore, with increasing globalisation of economies and business transactions, the evolution of technology to assist will occur with an international dimension.[6]
2. Nevertheless, whilst a number of commentators have considered the advent of electronic conveyancing, what has been rarely discussed in Australia is to what extent an economic/law analysis supports first; the Torrens system, and second; the move towards electronic conveyancing. The importance of an examination from this perspective is its ability to correlate the relationship between an aspect of the legal system and the economic performance of the country.[7] The economics/law analysis is also dictated by the fact that Torrens title, involving as it does, the maintenance of a government funded register,[8] taxpayer funded land title offices, and the use of public funds to compensate for those injured as a result of errors in that register,[9] - necessarily brings into question the central preoccupation of the economist, that of the allocation of scarce resources. Given this public funding of the system it is perhaps surprising that the matter has rarely attracted the attention of those outside legal scholarship, this arguably a reflection of the intrinsic success of the system. Moreover, this despite the fact that title registration has affected all parties who have sold, purchased, leased, mortgaged or created any of the myriad of other interests that can affect land in Australia today.[10]

3. In essence, what will be questioned by this article is the extent to which the essential themes of Torrens title - (these being the principle of indefeasibility.[11] and a State guaranteed title[12] are supported by the inexorable intrusion of the computer age and the need to ensure that scarce public resources are being allocated in the most appropriate manner.[13]

## **The Themes of Sir Robert Torrens**

4. The basis of any system of title by registration[14] is simple to state: "The philosophy of an ideal system is that it provides, as conclusive title binding all the world, a state-guaranteed registration evidenced by a certificate which reflects the exact state of the title at any moment in time. The ideal system substitutes registration for any inquiry into actual or constructive notice or facts about ownership." [15]
5. Title by registration must encompass comprehensiveness, so that all relevant interests are noted. The matter of primary importance must be registration; this is what provides the indefeasible title. Any problems that are caused by fraud, mistake or error are resolved by reliance on the assurance fund.[16] Five qualities have been identified as essential in any land registration system - these are reliability, simplicity, low cost, speed and suitability.[17]
6. The Torrens system in theory is more able to meet this criteria than 'old system' or 'general law' title. Reliability is brought about by three factors. First, title is neither historical nor derivative.[18] Second, title need not be searched beyond the immediacy of the register (unlike old system title which requires a search of a set period ranging from 20-60 years)[19] and third, transfers by way of void instruments not affecting the quality of the subsequently registered title.[20]
7. The second criterion, simplicity, flowing from the abolition of an historical search and the ability to largely undertake a 'one-stop' search of interests relevant to the title. The third factor, low cost, is achieved by the reduction in time spent by conveyancers and solicitors in confirming title - these savings being passed onto the consumer in the form of lower fees for conveyancing transactions.[21]
8. Speed is increased by the absence of a need to do an historical chronological critique of the title and suitability encouraged by the use of public funds to administer the relevant land title offices, and through funding of the indemnity scheme.[22] The absence of title insurance companies (as exist in the United States of America)[23] also indicating the suitability of Torrens for Australian conditions.
9. However, to what extent are these themes, largely unchallenged as they are[24] - supported by an economics/law analysis? Does this branch of theoretical discussion, which draws together the economic performance of a system with the legal rules that govern it, vindicate the essential tenets that have been outlined?

## **An Economics and Law Critique**

10. An analysis of this nature starts from the premise that scarce resources should be put to their highest value use. Thus, if the obstacles to bargaining (in economic terms, transaction costs) are kept to a minimum, resources will freely move to the parties that value them the most.

"Given scarcity, economics assumes that individuals and communities will (or should) attempt to maximise their desired ends (which may be of infinite variety) by doing the best they can with the limited resources (means) at their disposal. To the extent that means (or resources) can be made relatively less scarce, or stretched further, more ends or goals of individuals or communities can be realised." [25]

11. In the context of this article, the question is the extent to which the Torrens system (relying as it does on public funds) utilises those resources to their highest value use (particularly in the narrow aspect of competing forms of land registration - in the context here, a paper based as against an electronic method of transference of title).[26]

Will electronic data lodgement lead to lower conveyancing costs and an optimum distribution of the public funds that are allocated to fund the land title office and assurance fund? By moving from a system of individual liability and responsibility under 'old system' title, to what is in principle a compulsory allocation of loss across all members of society, have we adopted a method that can be supported by the law/economics movement? Consider the following simple scenario under both general law and Torrens title.

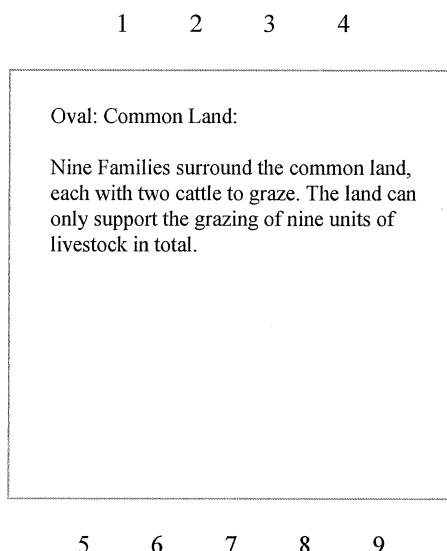
A has a fee simple estate in Landacre. Under general law, she leaves the chain of title and title deeds with her husband B when travelling interstate. B forges a conveyance to C who pays B \$150,000. B absconds and A returns from holiday - what interest does C have?

Ignoring any complicating factors, C would have no interest. The conveyance was void as a forgery and at common law, a void interest was ineffective to pass good title.<sup>[27]</sup> A would retain the fee simple. C's remedy would lie against B - given that he has absconded, C would invariably be out of pocket.

12. Under the Torrens system A leaves the certificate of title with her husband B. B forges A's signature to the memorandum of transfer and C is registered on title. B absconds. In this scenario, C would have an indefeasible title, A's remedy would lie against the assurance fund.
13. By this comparison, the difference in policy of Torrens as against general law is starkly demonstrated. The critical issue, the recovery of the loss and the identity of the titleholder are very different. In one, the loss is spread amongst all members of the community, in the other, recovery of loss is predicated on the ability to identify and successfully recover from the wrongdoer. Fundamentally, the fee simple estate in the Torrens transaction is statutorily transferred from the true owner to the innocent recipient. The property interest held by the registered proprietor in Torrens representing something less than the property interest held under general law. The Torrens title owner being unable to defeat the claims of a person subsequently registered against title. It is a title subject to an option. The registration process simplifies transactions but at the cost of destroying 'formal legal rights.'<sup>[28]</sup>
14. In economic terms what has been done is to suggest that the transaction costs associated with establishing good title under general law are so high, that the alternative system engendered by Torrens (whilst destructive of formal legal property rights) supports the allocation of a liability based solution to ensure a more effective distribution of resources.<sup>[29]</sup> In essence, rather than effect being given to property based rules, a liability solution is adopted because of the obstacles to establishing title under general law - the focus being on where best to allocate the loss.
15. Rose<sup>[30]</sup> notes that given that land is essentially durable and that it may have a succession of owners with a vast range of interests, it is critical that the "legal status of... property be kept relatively simple and transparent in order in order to avoid confusion to... multiple or successive interest holders." This analysis also explains various exceptions to indefeasibility, such as adverse possession.<sup>[31]</sup> The transparency of the adverse possessor, by their factual possession,<sup>[32]</sup> overriding the interest of the person with formal title.<sup>[33]</sup>
16. By contrast, under old system title, the interest of the true owner was never transparent. Any prospective purchaser required to undertake a set-period search (20-60 years) of past transactions to establish a good root of title.<sup>[34]</sup> Comparing this with Torrens system, where a purchaser is merely required to undertake a search of one record - the title neither being historical nor derivative.<sup>[35]</sup> In the context of property rights per se, Trebilcock<sup>[36]</sup> comments:

"Assuming that property rights have been defined and specified in ways that internalise costs and benefits from utilisation of a resource as fully as possible, the economic perspective on property rights would then focus on the importance of facilitating the transferability of these property rights so as to ensure that they end up in their highest valued social uses."
17. In the issue under discussion, the question is simply the converse - does the Torrens process of conveyancing facilitate the transfer of the property rights at the lowest possible cost - thus ensuring the maximisation of individual and community welfare. The economic perspective on this issue begins with the so-called Tragedy of

the Commons.[37] In this example from medieval England, many families had access to common land to graze their livestock.[38] For the purposes of illustration, assume that 9 families were able to access the common land to graze their livestock.



18. It can be assumed that each of the families have two cattle to graze (i.e. for the 9 families there is a total of 18 cattle to graze); however, the land can only sustainably have 9 cattle grazing on it. The joint welfare maximising solution is for each family to only graze one unit of livestock on the common land - thus leading to its sustainable usage. By contrast, the individual maximising welfare is for each family to graze both units of livestock, because each only bears a small cost of the overgrazing that will ultimately occur. The end result of this problem is that the resource is likely to be used to exhaustion.[39] The joint welfare minimising solution will be the end result.[40] By contrast has the Torrens system (by its adoption of a liability based solution) adopted the joint welfare maximising solution. Consider another classic economic analysis: the Prisoners' Dilemma.[41]
19. In this example, 2 persons are taken into custody, arrested near the scene of a burglary. At the police station, they are separated. If neither confesses to the burglary, they each will be charged with the lesser offence of carrying a concealed weapon and face 1 year in gaol. If both confess to the burglary, they will receive 3 years in gaol. If one suspect implicates the other to the burglary, that person will receive treatment that is more lenient and a 3-month gaol sentence is likely. The person implicated is likely to receive 4 years gaol. The options can be represented diagrammatically.

	Suspect A: Not Confess	Suspect A: Confess
Suspect B: Not Confess	1 year each	3 months for A/4 years for B
Suspect B: Confess	3 months for B/4 years for A	3 years each

20. The joint welfare maximising solution is for neither to confess and both then receive a 1-year gaol term. However, there is considerable incentive for each suspect to implicate the other on the possibility that the second person will not be doing likewise. If this successfully occurs, then their individual welfare will be maximised to the detriment of their accomplice.
21. This same analysis can be transposed to an evaluation of 'old system' title. In that system of conveyancing, a

defect in the chain of title (e.g., transfer by reason of a void instrument) will lead to potential loss of title and a remedy against the wrongdoer - a remedy that as illustrated may prove fruitless if the person has insufficient assets to satisfy any judgment or is beyond the reach of the jurisdiction.

22. By contrast, assuming none of the exceptions to indefeasibility is present, transfer by way of a void instrument is effective to pass title upon registration.<sup>[42]</sup> The loss occasioned in this transaction not being borne by one individual, but spread across society as a whole. Accordingly, taking a macro view, the Torrens system maximises the welfare of society as a whole, but in individual cases, effects a grievous injustice upon the formal legal owner - that being the loss of the property.
23. Summarising this analysis, the transaction or bargaining costs with general law are so high, (because of the need to undertake a set-period search to establish a good root of title) that the solution in Torrens to protect the registered owner and to compensate the innocent party who has lost their formal legal interest in the land, sees us adopting a liability based solution to this conundrum, rather than a property based model.<sup>[43]</sup> That is to say, we accept that the property interest is not paramount, that the right of the formal legal owner can be infringed, but that it is ultimately cheaper to allow that infringement and pay compensation (i.e. accept the liability), rather than enforce the proprietary rights of the formal legal owner. Across society, it is cheaper to allocate the loss by depriving the formal legal owner of their interest in land, even though the registered owner has obtained title pursuant to a void instrument. The property interest which the formal legal owner has, being extinguished because the welfare maximising solution is to deny this person their previous formal legal title, establish title in the registered proprietor and to compensate the first individual - with this liability being paid out of the assurance fund. Thus society, through its elected representatives, has valued certainty of title and indefeasibility more highly than ensuring that the property interest held is paramount. The Torrens system permits the infringement to occur, the property to be registered under the title of another and compensation to be paid by the State.
24. The next aspect to be addressed is the extent to which this submission is supported by a move to electronic data lodgement. In undertaking this analysis, a consideration of the claims made against the assurance fund in a number of different jurisdictions will be provided. If the critique would have us suggest that electronic data lodgement leads to significantly more claims on the assurance fund, then the support for the Torrens system is weakened and a re-evaluation with 'old system' title required.

### **Claims under the assurance fund**

25. An analysis of claims under the assurance funds of Australian jurisdictions demonstrates how electronic conveyancing will not only improve the conveyancing process by reducing the cost, making it more accurate and allowing it to be simpler, but that the underlying philosophy of a State guaranteed title and indefeasibility will be supported by this inexorable move towards electronic data lodgement. The advantages of electronic transfers in fulfilling the aims of Torrens, can be detailed as follows:
  - Reduction in the cost of maintaining land title offices;
  - Greater accuracy of the register;
  - Increased access through technology gateways to the information;
  - Cheaper conveyancers;
  - The priority of interests should be more readily apparent;
  - Quicker settlements;
  - Institutional (such as mortgagee) costs should be lower; and, (hopefully)
  - Reduced risk of fraud.<sup>[44]</sup>
26. Despite these many perceived advantages, the disadvantages cannot be understated. As indicated, the key features of Torrens title is the indefeasibility of that title and the State guarantee of it - with compensation payable if that guarantee is not met. Whilst technology should allow the possibility of fraud to be minimized,<sup>[45]</sup> does it conversely allow those committing the fraud to offend on a wider scale - thus bringing into question the security and stability of the register? It is obviously critical that this accuracy be ensured and provision made for the failings of technology.<sup>[46]</sup> The key will be in the capacity of those with computer expertise to deliver an



infallible system.

27. To this end, the legal problems associated with electronic conveyancing were foreshadowed by the decision of the Queensland Court of Appeal in *Imperial Bros Pty Ltd v. Ronim Pty Ltd*,<sup>[47]</sup> a decision from a jurisdiction where the issuing of a certificate of title is now optional.<sup>[48]</sup>
28. Imperial Bros had agreed to sell to Ronim a building for the sum of \$3.625ml. Clause 25.1 provided that "Completion shall be effected at such time and place as may be agreed upon by the parties. The time for completion shall be between the hours of 9am and 5pm on the Date for Completion." Clause 26 provided that time was of the essence. The agreed date for completion was 13 October 1998. Settlement was to be at 3.30pm. At about 12.30pm that day, the solicitors for the purchaser advised that they were not able to undertake a check of the title as the computer for the Land Titles Office was inoperative. A request was made for an extension to the next day. This was denied by the vendor. However, it was agreed that settlement would be deferred until 5pm. Whilst travelling to the settlement, severe thunderstorms and traffic disruptions caused the solicitor for the purchaser to be delayed by some minutes - arriving at the vendor's offices a short time after 5pm. The vendor refused to settle and the next day rescinded the contract.
29. The issue that was relevant for the present discussion was stated as follows: "[D]id the absence of any ability to establish title - because of the absence of a certificate of title and the circumstance that the computer was down, exclude any consequent right in the appellant to rescind?"<sup>[49]</sup> The court ultimately held that the obligation to complete the contract was suspended when through no fault of the parties, the departmental computer was inoperative.<sup>[50]</sup> An implied term was to be inserted into the contract to give effect to this principle. The basis of the reasoning of the court was that the vendor was required to show and make good title at the time of settlement. As the computer in the land title office was malfunctioning, the requirement could not be satisfied. By contrast, the appellant argued that as a settlement notice had been lodged, the purchaser had already obtained significant protection. Accordingly (as Imperial Bros submitted), there was, in the circumstances of this case no necessity to imply the term - to this the court responded: "we prefer the simpler view that, if the computer is down on the date fixed for completion, the purchaser being unable to search on that day, then the purchaser need not settle, and time ceases to be of the essence."<sup>[51]</sup>
30. The difficulties inherent in this decision are noted by Duncan and Christensen.<sup>[52]</sup> First, evidence will be needed of the attempts by the purchaser to access the electronic title, and second, if time being of the essence has been destroyed, a notice to complete must now be issued by one party before time would again become of the essence.<sup>[53]</sup> To resolve these difficulties, the following solution was proposed by the authors. That instead of a common law implied term, the legislature should statutorily introduce a term to the effect that if the computers are inoperative that:
  - "1) The vendor shall be deemed not to have proved title to the land being sold.
  - 2) Completion of the transaction shall be deferred (where time is of the essence for the contract) to a specified period of days beginning from the date of a notice delivered after the first continuous day of operation after computer access is fully restored.
  - 3) This specified period should be no longer than seven 'business' days.
  - 4) The specified period does not commence until either party gives notice to the other in writing that the Land Titles Office computers are again fully operational.
  - 5) From the date of the receipt of the notice by the party to whom it is given, time shall be deemed again to be of the essence of the contract."<sup>[54]</sup>
31. What this decision indicates is that electronic conveyancing will open new challenges for the law, and that the law can respond. Moreover, whilst that response may be common law or legislative, the opportunities and threats of technology cannot simply be ignored. But perhaps what is more critical than the response of the law is the question of whether the tenets of technology as demonstrated by allowing electronic transmission can fit within

the contemporary ideals of a Torrens based system - particularly as this system of land registration was introduced long before information technology became a catchphrase.

32. Indefeasibility and a State Guarantee of Title are the twin pillars that support the foundations of the house of Torrens. Indeed, it could be suggested that the crumbling of these foundations in the United States of America led to its failure in that jurisdiction. As noted by Young,<sup>[55]</sup> the inadequate administration by the regulators and the bankrupting of two funds by claims were two of the reasons for its lack of reception in North America, and in particular, the United States of America. Hammond made an extensive examination of claims made on the assurance funds of Western Australia, Queensland and New South Wales.<sup>[56]</sup> This examination being made in the context of whether the abolition of the paper based certificate of title would lead to increases or decreases in the number of claims made on the fund. The conclusion of Hammond was that the existence of the paper certificate of title operated as an effective safeguard against fraud, particularly where the fraud was to be committed by a third party. The conclusion was to the contrary where the fraud was to be carried out by a 'trusted agent', such as a member of the same family as the registered proprietor or a friend.<sup>[57]</sup> To this information can be added the following data from Tasmania. In a survey of 22 successful claims made on the assurance fund from 1993 to 2000, the causes of loss were identified as follows:

Claim No.	Problem	Amount of Loss (\$)	Reason for Loss
1	Easement Omitted	1295.12	Error in Land Titles Office led to failure to carry forward the easement onto the title of the burdened land
2	Mortgage lost	205.00	Mortgage documents lost within Office - new mortgage required to be registered
3	Survey Error	6162.42	Error in the survey of land when converted from general law
4	Wrongful Lapsing of Caveat	2410.00	Caveat lapsed within Office of Recorder in circumstances when this should not have occurred.
5	Easement Omitted	5350.00	Easement omitted on transfer of land.
6	Forgery by ex-husband	12000.00	Possession of certificate of title and fraud by ex-husband.
7	Mortgage lost	160	Mortgage documents lost within Office - new mortgage required to be registered
8	Mortgage lost	180	Mortgage documents lost within Office - new mortgage required to be registered
9	Mortgage lost	284	Mortgage documents lost within Office - new mortgage required to be registered
10	Easement not omitted when it should have been	32909.00	Error within office.
11	Mortgage lost	190.00	Mortgage documents lost within Office - new mortgage required to be registered

- |    |   |          |   |
|----|---|----------|---|
| 12 | Title incorrect                                   | 32600.00 | Error in land size as shown on title.   |
| 13 | Mortgage lost                                     | 190.00   | Mortgage documents lost within Office - new mortgage required to be registered  |
| 14 | Easement Omitted                                  | 3191.30  | Easement omitted by office in circumstances when it should not have been.   |
| 15 | Mortgage lost                                     | 180.00   | Mortgage documents lost within Office - new mortgage required to be registered  |
| 16 | Part of land vested in Crown - not shown on title | 7849.22  | Error in office, document-indicating part of land vested in Crown not attached to title when search was undertaken.   |
| 17 | Mortgage lost                                     | 515.00   | Mortgage documents lost within Office - new mortgage required to be registered  |
| 18 | Issue relating to issue of 4 separate titles      | 1285.00  | Office indicated that four separate titles could be obtained when this, ultimately, was not to be the case.   |
| 19 | Mortgage incorrectly noted                        | 133.00   | Wrong financial institution noted on title.   |
| 20 | Caveats omitted from title upon search            | 3978.00  | Caveats on microfilm records but not on title, error within office - failure to check microfilm records. These records 14 months in arrears of being recorded on title. |
| 21 | Mortgage lost                                     | 180.00   | Mortgage documents lost within Office - new mortgage required to be registered  |
| 22 | Removal of caveat by Office                       | 2616.37  | Removal of caveat by Office incorrect - this following Supreme Court decision <a href="#">[58]</a> on the matter.   |
33. The statistics demonstrate a number of things. First, the level of claims paid out under the assurance fund in Tasmania is very low (total amount paid \$113,683.43). This figure can be compared to New South Wales where for the period of 1994-1998, the amount paid out was \$3,096,000, with contingent liability being \$10,483,500.[\[59\]](#) Furthermore, in Tasmania there was only one claim for fraud, whereas of the 81 claims in New South Wales, 38 resulted from fraud.[\[60\]](#)
34. Of the cases in Tasmania, 10 can be placed into the category where the mortgage dealing was either lost (9) or in one case, the wrong financial institution was inserted onto the title. One could surmise that lodgement of the data in electronic form would have removed these claims. As the financial institution would file the information directly onto title, there would be no opportunity for either, the wrong name to be transposed, or for the dealing to be lost. The one case of fraud in Tasmania resulted from the misuse of the certificate of title, again, the abolition of the certificate may have reduced the opportunity for this to occur - though of course it is recognised that whatever security system is put in place with computer technology, the potential for fraud will never be completely eliminated. The other 11 cases that occurred in Tasmania resulted from easements not being carried forward, or caveats being wrongfully removed or incorrect advice being given. Again, the potential for this to occur will be reduced significantly as the errors that emanate from transposing of information will be eliminated by lodgement of information in the form of electronic data.

35. In summary, the evidence that Hammond obtained, together with the analysis of the Tasmanian claims indicates that the move towards electronic conveyancing should reduce the number of claims under the assurance fund. However, this conclusion is conditional, (as Hammond suggests),<sup>[61]</sup> on the introduction of a number of safeguards into the electronic process. These safeguards include additional attestation requirements for the witnessing of documents, the onus being placed on the conveyancer to establish that the person with whom they are dealing has the requisite authority, and the issue of a folio identification number (similar to a PIN) which would be required to be produced when the title to the land is being altered.
36. A further alternative indicated by Whitman<sup>[62]</sup> is for digital signatures to be recognised in substitution for the conventional pen and ink signature. The digital signature would be recognised by way of public key infrastructure, which would provide for a certification authority to issue a digital identification that would consist of two strings of characters. One string would be public, the second private. The public string of characters (or keys) would be available to everyone; the private keys would obviously be unique and kept confidential by the individual. The two keys would be mathematically related, but it would be 'computationally infeasible'<sup>[63]</sup> for anyone to derive the private key from the public. Whitman explains<sup>[64]</sup> that to use the private key to sign a document would work as follows. A computer 'hashing' algorithm would be used to generate a random code that would represent the contents of the data. The private key and the hash code would then be encrypted to produce the signature. This information is then transmitted to the land title office, which would then obtain the public key (from the Certification Agency, which will also provide the name of the individual to which it was provided), which is then used to decrypt the digital signature. The Office will obtain the public key and apply it to the digital signature received. From this the Office will be able to verify the identity of the person and the contents of the data. Whilst complex to relate, Whitman suggests that the process would largely be carried out without human intervention and would normally take only minutes at most.<sup>[65]</sup> This issue is also recognised by Birrell who states:<sup>[66]</sup>
- "The recent legislative reform in Queensland is at best a partial answer. While it has removed the mandatory issuing of Certificates of Title, it has not addressed the underlying incongruity of paper within an electronic system. The ghosts of the last century remain in its continuing requirement of signed and witnessed paper instruments. The electronic conveyancing of [this century] must address this issue. The answer may be found in an expanded concept of agency in which agents are authorised to complete the transaction on behalf of the parties. Perhaps authorised classes of customers should be responsible for updating the Register. This solution would require a combining of the present separate roles of settlement and registration. The paperless transaction system of the Australian Stock Exchange may point the way."
37. Cocks and Barry also suggest another alternative<sup>[67]</sup> - this being the issue of a 'Landcard' that would operate like a credit card and be verified by password. Solicitors regularly involved in the conveyancing process would obtain a merchant's card allowing them to operate for a given period. Private individuals would be able to obtain a Landcard for an individual transaction. "Obtaining a Landcard will be like opening a bank account and will depend upon the applicant establishing identity to the satisfaction of an authorised Identification Service Provider."<sup>[68]</sup> This Landcard will allow the electronic execution of documents - from which a database will be created and the information supplied and extracted. As noted by Cocks and Barry:<sup>[69]</sup>
- "Impersonation however will be reduced by the electronic system. At the moment a person who can secure the paper title (the right to deal) has a reasonably good chance of impersonating the registered proprietor provided that they are of the right sex and can keep a straight face. Even if the first condition is a problem, they can simply recruit an accomplice. Obtaining a Landcard (the right to deal) will only be possible if the applicant can establish identity to an ISP [Identification Service Provider] and that will require more than a pretty face and plausible patter."
38. The preceding analysis of the options available for electronic data lodgement sees the following advantages, whatever system is adopted. Greater certainty of title achieved by immediate registration, the elimination of the gap between settlement and registration, increased accuracy of the register and (hopefully) a reduction in costs. This reduction in costs benefiting the users, (no doubt, these people also being taxpayers), who currently

contribute to consolidated revenue by reason of the fees/charges currently imposed on the lodgement of dealings. As previously noted, the title given by Torrens is in essence a property interest, subject to the option of another,<sup>[70]</sup> that option being the right of another to extinguish or modify your interest if they are able to have their interest registered.

39. Does technology hinder or assist in the satisfaction of these criteria? Was the Torrens system more suitable in an environment where large-scale fraud was not possible due to the existence of only one genuine paper copy of the certificate of title? Will the abolition of the certificate of title allow those with the capacity to obtain unauthorised access the ability to perpetrate large-scale fraud? It is submitted that not only does technology not hinder in the meeting of these criteria, but that indeed it can greatly assist in ensuring that the aims of Sir Robert Torrens are finally met. As noted by Birrell in terms of the overall goal - a goal that can only be reached by the introduction of computer enhanced conveyancing:<sup>[71]</sup>

"The future vision: a national datum, a national surveying code, a national Land Register, and national land registration legislation. The results: a seamless surveying system, a common Torrens system, and possible cost savings. The current reality: state datums, state surveying codes, state land Registers, and state land registration legislation. The results: conflicts between surveying systems, competition between the states to be the best, fragmented land Registers and high running costs to operate. We are living in an environment of national markets and mutual recognition, yet we still operate eight varieties of the Torrens system. Australia is one country, we need one datum, one survey code and one Land Register."

40. Much of what has been said depends on the ability of information technology specialists to deliver a system that is largely infallible. The suggestions that have been made have been premised on this. The ability of the information relevant to the conveyancing process to be lodged electronically will surely lead to a reduction in the number of claims made against the assurance fund. Office errors that result from the transposing of information will largely be eliminated (such as omitted easements, removed caveats etc), the misplacing of dealings such as mortgages should not occur and the ability of 'trusted agents' to commit fraud by obtaining the certificate of title will be minimised. The danger that may result is that the ability of third parties to commit fraud on a large scale through infiltration of the computer's security system is the obvious concern, but this is something that should be overcome, or lessened, by appropriate security measures. Certainly from a Tasmanian perspective, the lodgement of conveyancing information in purely electronic form (a necessary corollary being the abolition of paper based certificates of title) would lead to less claims being made against the assurance fund (provided the technological safeguards are put in place). This evidence alone suggests that the move to electronic data lodgement must be unimpeded.

## **Conclusion**

41. There is no doubt that the move towards electronic conveyancing will continue unabated. The information technology experts have an unshakeable grip on the psyche of society and the need to reduce the human element in transactions. In conveyancing terms, this offers a promise of greater accuracy, more certainty of title, and provided the security concerns of access to central databases can be overcome, the opportunity for reduced claims on the assurance fund. Whilst, as Hammond<sup>[72]</sup> indicated, the paper based certificate of title may have acted as a barrier to third party fraud, its abolition should, it is submitted, not increase the level of risk, but in fact reduce it provided the security concerns can be overcome. To this end, the options such as Landcard, Folio Identification Numbers and Public Key Infrastructure all offer the promise of meeting these concerns.
42. A law/economics analysis also supports this inexorable move: the State sanctioned system of guarantee of title and compensation for those deprived providing a lower cost alternative across society, than depriving a person of an interest they thought they have legitimately purchased and to require them to seek compensation from a wrongdoer. The Torrens system thus invokes a joint welfare maximising solution. The move towards electronic data lodgement only supports this. By ensuring greater accuracy in the register and thus decreasing the level of claims made on the assurance fund, there is a reallocation of resources from the public purse. In summary, the

goals of Sir Robert Torrens may ultimately be realised by means, of which, the man himself was blissfully ignorant.

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## Notes

[1] Department of Information Technology and Management (NSW), Annual Report 1998-1999, at 28.

[2] Department of Information Technology and Management (NSW), Land and Property Information, Bulletin No. 29, August 2001 at 3.

[3] See generally, Department of Natural Resources (Qld), Land Titles Customer Services Bulletin, December 2000.

[4] R. Cocks and J. Barry, "Electronic Conveyancing: Challenges for the Torrens System", (2001) 8 APLJ 270.

[5] See for example, D. Whalan, "Electronic Computer Technology and the Torrens System", (1967) 40 ALJ 413.

[6] For a discussion of the problems and possibilities in the United Kingdom Land Registration for the Twenty-First Century - A Consultative Document, Law Com No. 254, Cm 4027, September 1998: for developments in the United States see DA Whitman, "Digital Recording of Real Estate Conveyances", (1999) 32 J. Marshall L. Rev. 227.

[7] See generally, M. J. Trebilcock, "An Introduction to Law and Economics", (1997) 23 Monash University Law Review 123.

[8] The relevant Torrens legislation in each jurisdiction is as follows: Land Titles Act 1925 (ACT); Real Property Act (NT); Land Title Act 1994 (Qld); Real Property Act 1886 (SA); Land Titles Act 1980 (Tas); Transfer of Land Act 195

[8] (Vic); Transfer of Land Act 1893 (WA); Real Property Act 1900 (NSW).

[9] On the assurance fund, see the following sections: Land Titles Act 1925 (ACT) ss154/155; Land Title Act 1994 (Qld) ss188-190; Real Property Act 1886 (SA) ss203-04; Land Titles Act 1980 (Tas) ss152/153; Transfer of Land Act 1958 (Vic) 109; Transfer of Land Act 1893 (WA) ss 201,205; Real Property Act 1900 (NSW) s126. Interestingly the Northern Territory legislation makes no provision for compensation.

[10] As commented in the American context by C Dent Bostick, "Land Title Registration: An English Solution to an American Problem", (1987) 63 Ind L. J. 55 at 55-56: "Some fifty years ago, respected American legal scholars engaged in an extended debate on the virtues and the feasibility of land title registration. That subject was not one that might be expected to rivet the attention of the academic legal community, let alone that of the profession at large. Beyond the legal profession, there was probably no awareness of this scholarly debate among the American public. Yet this professorial exchange centered on a subject of substantial national importance. It is not an overstatement to suggest that problems relating to matters of title assurance have affected directly the pocketbook of every American who has brought or sold land in this century. Any practitioner who has had to explain to a client the astonishingly high 'closing costs' related to title search and title insurance, and any client who has had to pay these costs, is painfully aware of the shortcomings of title assurance under the existing American practice." (citations omitted).

[11] Land Titles Act 1925 (ACT) s52; Real Property Act (NT) s80; Land Title Act 1994 (Qld) s46; Real Property Act 1886 (SA) s80; Land Titles Act 1980 (Tas) s40; Transfer of Land Act 1958 (Vic) s41; Transfer of Land Act 1893 (WA) s63; Real Property Act 1900 (NSW) s40.

[12] For a discussion concerning the retention or abolition of the assurance fund, see the joint paper issued by the Law Reform Commissions of Victoria and New South Wales, Torrens Title: Compensation of Loss, June 1989.

[13] On this last aspect, it can be noted that an American scholar has considered the economic benefits of Torrens title against title assurance systems that primarily operate in the United States. See J. T. Janczyk, "An Economic Analysis of

the Land Title Systems for Transferring Real Property", (1977) Journal of Legal Studies 2

[13] and by the same author: "Land Title Systems, Scale of Operations, and Operating and Conversion Costs", (1979) Journal of Legal Studies 569. See also Ontario Law Reform Commission, Report on Land Registration, Department of Justice, 1971.

[14] As noted in *Breskvar v. Wall* (1971) 126 CLR 376; (1972) ALR 205.

[15] Bostick, above n 10 at 60.

[16] As noted by Bostick above n 10 at 61.

[17] As noted by S. Birrell, J. Barry, D. Hall and J. Parker, "Is the Torrens System Suitable for the 21st Century", published in Proceedings of 1995 New Zealand - Australia Cadastral Conference, Wellington, New Zealand, 14-16 June (copy held with author). These five criteria first identified by C. Brickdale, *Methods of Land Transfer* (1914) 1-11.

[18] *Breskvar v Wall* (1971) 126 CLR 376; (1972) ALR 205.

[19] Conveyancing Act 19

[19] (NSW) s53; Property Law Act 1974 (Qld) s237; Conveyancing and Law of Property Act 1884 (Tas) s35; Property Law Act 1958 (Vic) s44; Property Law Act (WA) s22. In most States, the period is 30 years; Tasmania, 20 years whereas in South Australia the period appears to be still the common law period of 60 years. In South Australia and Queensland the process of converting all alienated land to Torrens has been completed.

[20] See cases such as *Breskvar v Wall* (1971) 126 CLR 376; [1972] ALR 205; *Frazer v Walker* [1967] 1 AC 569; 1 All ER 649.

[21] By way of example, the scale fee in Tasmania for a conveyance under Torrens of a \$200,000 residential property was quoted to the author as \$1800.00. By contrast, the quote that I was given for an 'old system' or 'general law' title was \$2000.00.

[22] See generally The Honourable Mr Justice Young, "Why did the Torrens System Succeed in Australia yet Fail in North America", (1994) APLJ Lexis 24.

[23] As noted by Young, above n 22 at 6 title insurance companies have a loss ratio of 1.69%. This obviously gives those companies a stake in ensuring that the status quo is retained.

[24] For a recent decision that supports the importance of immediate indefeasibility in the Torrens System, see *Conlan (as Liquidator of Oakleigh Acquisitions Pty Ltd) v Registrar of Titles*, [2001] WASC 201, 3 August 2001, Owen J.

[25] Trebilcock, above n 7 at 125.

[26] In terms of an economic comparison of 'old system title' with Torrens title see JT Janczyk, "Land Title Systems, Scale of Operations, and Operating and Conversion Costs", (1979) Journal of Legal Studies 569. In particular see the summary at 582. See also Ontario Law Reform Commission, Report on Land Registration, Department of Justice, 1971 at 135-151.

[27] *Pilcher v. Rawlins* (1872) 7 Ch App 259. It is an application of *nemo dat quod non habet* (no-one gives who does not possess).

[28] As noted by Carol M Rose, "Property and Expropriation: Themes and Variations in American Law", (2000) Utah L. Rev 1 at 7-8.

[29] The terms emanating from the work of G. Calabresi and A. Douglas Melamed, "Property Rules, Liability Rules and Inalienability: One View of the Cathedral" 85 Harv L. Rev. 1089 (1972).

[30] Carol M Rose, "Property and Expropriation: Themes and Variations in American Law", (2000) Utah L. Rev 1 at 7-8.

[31] Land Titles Act 1925 (ACT) s69 (no title to land may be acquired by adverse possession); Real Property Act (NT) s251; Land Title Act 1994 (Qld) s185; Real Property Act 1886 (SA) s251; Land Titles Act 1980 (Tas) ss138T-138Y; Transfer of Land Act 1958 (Vic) s42; Transfer of Land Act 1893 (WA) s68; Real Property Act 1900 (NSW) Part VIA.

[32] For examples, see *Pratten v. Warringah Shire Council* (1969) WN Pt 1 (NSW) 134; *Clement v Jones* (1909) 8 CLR 133; 15 ALR 158; *Hyde v Pearce* [1982] 1 All ER 1029.

[33] See Rose, above n 28 at 7-8.

[34] See above n 19.

[35] See generally, *Breskvar v Wall* (1971) 126 CLR 376.

[36] Trebilcock, above n 7 at 135-6.

[37] G Hardin, "The Tragedy of the Commons", (1968) Science 1243. Another well-known starting point is the Prisoners Dilemma, see J. Hirshleifer, "Evolutionary Models in Economics and Law: Cooperation Versus Conflict Strategies, 4 Res. in Law & Econ 1 (1982)

[38] See Trebilcock, above n 7 at 138-39 for a discussion of this example - this is where the diagram is taken from.

[39] As noted by Carol M Rose, (1998) "Canons of Property Talk, or, Blackstone's Anxiety" 108 Yale LJ 601.

[40] See Trebilcock, above n 7 at 139.

[41] Example taken from Trebilcock, above n 7 at 136.

[42] See *Breskvar v Wall* (1971) 126 CLR 376; [1972] ALR 205; *Frazer v Walker* [1967] 1 AC 569; 1 ALL ER 649.

[43] See G. Calabresi & A Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral", 85 Harv L. Rev 1089 (1972); L. Kaplow & S. Shavell, "Property Rules versus Liability Rules: An Economic Analysis" 109 Harv L. Rev. 713 (1996).

[44] See Whitman, above n 6 at 234.

[45] As indicated by Whitman, above n 6 at 234, digital signatures, if properly administered, should be much harder to forge than paper based signatures.

[46] See the comments by the English Law Commission, above n 6 at 256.

[47] [1999] 2 Qd R 172.

[48] Following the introduction of the Land Title Act 1994 (Qld), s42.

[49] [1999] 2 Qd R 172 at para 10.

[50] [1999] 2 Qd R 172 at para 18.

[51] [1999] 2 Qd R 172 at para 20.

[52] WD Duncan and SA Christensen, "Overcoming the Problems of Showing and Making Cyber Title", [1999] APLJ Lexis 20.



[53] Duncan and Christensen, above n 52 at 19-21.

[54] Duncan and Christensen, above n 52 at 29-30.

[55] The Honourable Mr Justice Young, "Why did the Torrens System Succeed in Australia yet Fail in North America", [1994] APLJ Lexis 24 at 3-4 (quoting from Scick and Plotkin *Torrens in the United States*, (Lexington Books, 1978)).

[56] C. Hammond, "The Abolition of the Duplicate Certificate of Title and its Potential Effect on Fraudulent Claims over Torrens Land", [1999] APLJ Lexis 23.

[57] As noted by Hammond, above n 56 at 31: "In essence, the statistics show that production of a duplicate certificate of title operates as an effective safeguard against third party fraud. The extremely rare cases of fraud by third parties across all three jurisdictions bears this out. However, the existence of a duplicate certificate of title is less effective as a safeguard where 'trusted agents', friends or family are involved in the fraud. In these cases, access to the duplicate certificate of title by the fraudulent party makes it easier for them to perpetrate fraud and to obtain registration of the fraudulent dealing."

[58] See *R. v. Recorder of Titles: Ex parte Horlock* Unreported 25/1991 (Tas)

[59] No contingent figure for Tasmania was available.

[60] See Hammond, above n 56 at 25.

[61] See Hammond, above n 56 at 33-42.

[62] Whitman, above n 6 at 247-254.

[63] See Whitman, above n 6 at 248.

[64] Whitman, above n 6 at 249.

[65] See the comments by Whitman, above n 6 at 249-250.

[66] Birrell, above n 17 at 3.

[67] Cocks and Barry, above n 4 at 274.

[68] Cocks and Barry, above n 4 at 274.

[69] Cocks and Barry, above n 4 at 276.

[70] See Carol M Rose, (1997) "The Shadow of the Cathedral", 106 Yale LJ 2175.

[71] Above n 17 at 5.

[72] Hammond, above n 56.

# In Personam, *Garcia v NAB* and the Torrens System – Are They Reconcilable?

Lynden Griggs\*

A recent article in the *Australian Law Journal* raised the following issue. “[A] final question remains. It is not of principle, but of policy: Would the allowance of some or all claims within the law of unjust enrichment in relation to registered title undermine the objectives of the Torrens system? This final question is undoubtedly the most important.”<sup>1</sup> This article is an attempt to explore this issue by an examination of a hypothetical, based loosely on the facts of *Garcia v NAB*<sup>2</sup> - and how that case would have been resolved if the argument had been put that the title of the mortgagee was indefeasible because of the operation of the Torrens system.<sup>3</sup> This paper thus explores the relationship between the concept of indefeasibility of title; the very foundation of Torrens, and how the use of the in personam exception to indefeasibility (with an extension to claims in unjust enrichment) may undermine the central tenets of a land registration system that on the whole, has been extraordinarily successful.<sup>4</sup> The importance of this lies in the fact that if unjust enrichment type claims are not ‘subject to’ the indefeasibility provisions, then the in personam exception, which for so many years had been restricted following the New South Wales Court of Appeal decision in *Mercantile Mutual v. Gosper*<sup>5</sup> may in fact have a reach that is undesirable within the context of claims that relate to Torrens land.

Accordingly, Part 1 of this paper will examine the policy goals of the Torrens system, Part 2, the decision in *Garcia v NAB* with Part 3 bringing these disparate threads together.

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\* Senior Lecturer in Law, University of Tasmania. Thanks to the comments of anonymous referee. The usual caveat applies.

<sup>1</sup> J Moore, ‘Equity, restitution and in personam claims under the Torrens system: Part Two’ (1999) 73 *ALJ* 712 at 715. This article followed an earlier piece by the same author, J Moore, ‘Equity, restitution and in personam claims under the Torrens system’ (1998) 72 *ALJ* 258.

<sup>2</sup> (1998) 72 *ALJR* 1243. It is unclear from the case whether the land in question was Torrens land.

<sup>3</sup> See R Chambers, ‘Indefeasible Title as a Bar to a Claim for Restitution’ [1998] *Restitution Law Review* 126 where he examines the technical issues associated with the relationship between indefeasibility and the concept of unjust enrichment. This paper concentrates more on the policy issue as outlined.

<sup>4</sup> See Whalan, ‘Immediate Success of Registration of Title to Land in Australasia and Early Failures in England’ (1967) 2 *NZULR* 416.

<sup>5</sup> (1991) 25 *NSWLR* 32.

## The Goals of Torrens

The starting point for analysis of the Torrens system can be provided by the man who gave his name<sup>6</sup> to the reforms that have reshaped land registration in Australia in the last 150 years. The design of the system was to

give security and simplicity to all dealings with land by providing that the title shall depend upon registration, that all interests shall be capable of appearing or being protected upon the face of the registry, and that a registered title or interest shall never be affected by any claim or charge which is not registered.<sup>7</sup>

As the oft-repeated statement of the High Court in *Breskvar v Wall*<sup>8</sup> says: “[it is] not a system of registration of title but a system of title by registration”.<sup>9</sup> Title is not historical or derivative, in essence each transfer of land involves surrender back to the Crown and a fresh grant from the State<sup>10</sup> - because of this surrender and reissue philosophy, there is no necessity to search the antecedents to the title.<sup>11</sup> The title of the registered proprietor was to be indefeasible, subject only to such estates, or interests that are noted on the Register – in a number of jurisdictions this very concept of indefeasibility being statutorily delineated.<sup>12</sup> What the concept of indefeasibility does is provide for the underlying ideals of the “curtain and mirror” principle of land registration. The curtain being represented by the Register – nothing behind the Register (or the curtain) would effect the title of the registered proprietor. Further, the mirror<sup>13</sup> (again the Register) would accurately and precisely reflect the estates and interests that were appurtenant to the title of the land. Each title is, if you like, independent of what has gone on previously. To reflect the importance of the register and to provide compensation to those who suffer loss, an assurance fund was to be established to benefit those who have been deprived.<sup>14</sup> Allied to the “curtain and mirror” was the express recognition that

<sup>6</sup> There is considerable controversy as to whom the authorship of the Torrens system should actually be attributed. For a discussion of this see P Moerlin Fox, ‘The Story behind the Torrens system’ (1950) 23 ALJ 489; Robinson, *Transfer of Land in Victoria*, Law Book Co Melbourne 1979 at ch 1.

<sup>7</sup> Opening Statement in the Report of the Real Property Law Commission in November 1861 (SA): Parl Paper No 192 (1861). Sir Robert Torrens was one of the Commissioners. For a discussion of the history behind the legislation, see D Pike, ‘Introduction of the Real Property Act in South Australia’ (1960) 1 Adel LR 169.

<sup>8</sup> (1971) 46 ALJR 68.

<sup>9</sup> *Breskvar v Wall* (1971) 46 ALJR 68 at 70 per Barwick CJ.

<sup>10</sup> R R Torrens, *The South Australian System of Conveyancing by Registration of Title*, Adelaide Register and General Observer Printing Offices 1859 at 9.

<sup>11</sup> In most States the period of prior searching required for General Law or old system title land is 30 years: *Conveyancing Ordinance* 1951 (ACT); *Conveyancing Act* 1919 (NSW) s 53; *Property Law Act* 1974 (Qld) s 237; *Conveyancing and Law of Property Act* 1884 (Tas) s 35 (20 years); *Property Law Act* 1958 (Vic) s 44; *Property Law Act* 1969 (WA) s 22.

<sup>12</sup> *Land Title Act* 1994 (Qld) ss 38, 169, 170; *Real Property Act* 1886 (SA) ss 10, 69; *Land Titles Act* 1980 (Tas) s 40.

<sup>13</sup> See L McCrimmon, ‘Protection of Equitable Interests under the Torrens System: Polishing the Mirror of Title’ (1994) 20 Mon LR 300.

<sup>14</sup> *Transfer of Land Act* 1958 (Vic) ss 109-111; *Real Property Act* 1900 (NSW) ss 126-127; *Land Title Act* (1994) (Qld) s 189; *Real Property Act* (1886) (SA) ss 203-211; *Transfer of Land Act* 1983 (WA) ss 201, 205; *Land Titles Act* 1980 (Tas); ss 152-153; *Land Titles Act* 1925 (ACT) ss 145-6.

notice of prior interests was irrelevant and that knowledge of prior interests was not to be imputed as fraud.<sup>15</sup>

This change was dramatic. Previously, right to pass title to land had traditionally been subject to proof of ownership.<sup>16</sup> Further, there would be interests, which though not evident in the title documentation, would bind the purchaser, because either they were enforceable by the court of equity, or the purchaser was deemed to have notice of them. To further the aims of the “curtain and mirror”, Torrens argued that no interest in land should be created or accepted prior to registration – the title as represented by the Register was to be paramount.

Instruments when executed are merely personal contracts between the parties, upon which action for damages may be raised, but they do not bind the land. The entry on the folium of the Register alone passes the property, creates the charge or lesser estate, discharges, or transfers it.<sup>17</sup>

Arguably this omission to take account of unregistered interests (though conversely, one suspects that Torrens would not have regarded it as an omission, given that he considered that unregistered interests were only to operate between the parties) has led to the obscuring of some of the important and critical policy objectives of the system.<sup>18</sup> In a contemporary environment, where the importance and significance of equity jurisprudence is not to be underestimated, the Torrens system has had to adapt to the complexity of interests that attach to modern land holdings and to provide some form of mechanism for their recognition and protection.<sup>19</sup>

Despite these policy aims of indefeasibility of title, the paramountcy of the register, and the inconsequential relevance of knowledge of earlier interests, the courts have consistently held that this does not permit the registered proprietor to decline to enforce contracts that he or she has entered into.<sup>20</sup> Furthermore, the judiciary has consistently accepted that they retain the residual discretion to recognise the personal equity and give effect to it.

<sup>15</sup> See the following provisions: *Transfer of Land Act* 1958 (Vic) s 43; *Real Property Act* 1900 (NSW) s 43; *Land Title Act* (1994) (Qld) s 184; *Real Property Act* (1886) (SA) s 186-7; *Transfer of Land Act* 1983 (WA) s 134; *Land Titles Act* 1980 (Tas); s 41; *Real Property Act* (NT) s 71A/71B; *Land Titles Act* 1925 (ACT) s 59.

<sup>16</sup> See the discussion by S Robinson, ‘Claims in Personam in the Torrens System: Some General Principles’ (1993) 67 *ALJ* 355 at 355.

<sup>17</sup> R Torrens, *A Handy Book on the Real Property Act of South Australia*, (1862) at 8.

<sup>18</sup> See the comments by M Hughson, M Neave & P O’Connor, ‘Reflections on the Mirror of Title: Resolving the Conflict between Purchasers and Prior Interest Holders’ (1997) 21 *MULR* 460 at 462.

<sup>19</sup> The High Court in *Barry v Heider* (1914) 19 CLR 197; 21 ALR 93 accepting that interests prior to registration do operate in equity. The caveat system provides for the necessary protection of unregistered interests. See the following provisions: *Transfer of Land Act* 1958 (Vic) ss 89-91; *Real Property Act* 1900 (NSW) ss 74F-74R; *Land Title Act* (1994) (Qld) s 121-131; *Real Property Act* (1886) (SA) s 191; *Transfer of Land Act* 1983 (WA) ss 136K-142; *Land Titles Act* 1980 (Tas); ss 133-138; *Land Titles Act* 1925 (ACT) ss 104-108.

<sup>20</sup> See for example *Maddison v McCarthy* (1865) 2 WW and aB(Eq) 151; *Robinson v Keith* (1870) 1 VR(Eq) 11; and recently *Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32 – though of course, strictly speaking, “Implementation of this goal [the idea that transactions giving rise to equitable interests only resulted in a contractual interests, rather than proprietary interests] would have required abandonment of the principle that a specifically enforceable contract passes an equitable interest in land” M Hughson, *supra* n 18 at 461.

Registration... confers upon the registered proprietor a title to the interest in respect of which he is registered which is... immune from adverse claims, other than those specifically excepted... this principle in no way denies the right of the plaintiff to bring against the registered proprietor a claim in personam, founded in law or in equity, for such relief as court in personam may grant.<sup>21</sup>

As asked at the outset, can we now add a further subset of in personam claims, today based on unjust enrichment – and would the allowance of these types of claims undermine the aforesaid objectives of the Torrens legislation – in essence the concept of the “curtain and mirror”. Chambers<sup>22</sup> thinks not. What this article proposes to examine is whether from a policy perspective, this is correct. Will the allowance of the policy motivated relief<sup>23</sup> that was evident in *Garcia v NAB* undermine the Torrens system and its critical imperatives.

Indefeasibility is “designed to protect a transferee from defects in the title of the transferor, not to free him from interests which he has burdened his own title”.<sup>24</sup> But beyond this, what are the limits or the content of the in personam exception, can they be stated so that some conclusion can be drawn as to whether the type of unjust enrichment claim evident in *Garcia* should be admissible against the title of Torrens land. At the outset, there is no doubt that the limits of the in personam exception have not been clearly defined.<sup>25</sup> In determining the high or low-water mark<sup>26</sup> of the content of the in personam exception, recourse must be had to the decision of the New South Wales Court of Appeal in *Mercantile Mutual Life Insurance Co Ltd v Gosper*.<sup>27</sup>

### ***Mercantile Mutual Life Insurance Co Ltd v Gosper***

Mrs Gosper was the sole registered proprietor of land. At the time of purchase, it was mortgaged to the extent of \$205,000. Subsequently Mrs Gosper’s husband varied the mortgage so that the total sum secured rose to some \$550,000. Mrs Gosper’s signature was forged to the relevant documentation. Upon the death of Mr Gosper, the fraud was discovered. Mrs Gosper argued that she was entitled to have the mortgage discharged upon repayment of the original sum, whereas Mercantile Mutual argued that as its interest was registered, its title was indefeasible and the property secured the larger amount.

<sup>21</sup> *Frazer v Walker* [1967] NZLR 1069 (PC) at 1078. This principle can be seen as early as 1927 in *Tataurangi Tairuakena v Mua Carr* [1927] NZLR 688.

<sup>22</sup> Chambers, *supra* n 3 at 134 considers not: “A primary objective of the Torrens system is the avoidance of the expense, difficulty, and delay of investigating and proving the validity of a vendor’s title. The inclusion of claims for restitution of unjust enrichment in the category of ‘in personam exceptions’ does not conflict with this objective.”

<sup>23</sup> As described by J Moore (1999) *supra* n 1 at 714.

<sup>24</sup> *Bahr v Nicolay (No. 2)* (1988) 164 CLR 604 at 653.

<sup>25</sup> C McDonald, L McCrimmon, A Wallace & M Stephenson, *Real Property Law in Queensland*, LBC Information Services Sydney 1998 at 335: “In 1969 one commentator noted that, ‘it is evident that the limits of the registered proprietor from adverse claims *in personam* have not been clearly defined.’ This observation applies with equal force today.”

<sup>26</sup> As described by D Skapinker, ‘Equitable interests, mere equities, ‘personal’ equities and ‘personal equities’ – distinctions with a difference’ (1994) 68 *ALJ* 593 at 596.

<sup>27</sup> (1991) 25 NSWLR 32.

The reasoning of the New South Wales Court of Appeal was that the forged instrument could be set aside where there was an enforceable personal equity against Mercantile Mutual – ie where in personam could apply. In the case, it was held that the personal equity arose against the appellants because of their use of the certificate of title without the consent or authority of the registered proprietor.

But the company had no authority to produce or otherwise use the certificate of title for such a purpose. It had, of course, no implied authority as mortgagee under the (valid) existing mortgage standing in its name. And no authority was in fact given for the purpose by Mrs Gosper... Therefore what Mercantile Mutual Life Insurance Co Ltd did in this regard was done without any authority.

The proper conclusion is, in my opinion that the company used the certificate of title in breach of its obligations to Mrs Gosper and that its use of it in that way was a necessary step in securing the registration of the forged variation of mortgage.<sup>28</sup>

Thus it was the use of the certificate without the authority that gave rise to the personal equity. There was no requirement or necessity that the company had used the documents negligently or without proper care.<sup>29</sup> Further, Mahoney J considered that it was possible that the personal equity could arise, not merely from the acts of the registered proprietor, but from the acts of some other person.<sup>30</sup> The following criticism can be made of this case.

Given that registration confers indefeasibility, that the mortgagee had no knowledge of the fraud, and that production of the certificate of title was an essential – albeit mechanical – requirement for registration, the personal equities principle should not be used in a case like the present to cut back the benefits of indefeasibility. If [the husband] had stolen the certificate of title from [his wife] and given it to the mortgagee for registration of the variation, there would have been no argument for a personal equity, even though it had been used without [the wife's] authority. The fact that the mortgagee already had possession of the certificate of title should not – in the absence of fraud, or knowledge of fraud, on its part – give rise to a personal equity. Any other result undermines the confidence in the Torrens register.<sup>31</sup>

It is this conundrum that is at the heart of the issue in this paper. Should a personal equity arise in circumstances of what is ultimately policy motivated relief - where to allow the claim cuts back the operation of the Torrens legislation. That is, if the acts of the registered interest holder do not involve any misrepresentation, there is no misuse of power, no improper attempt to rely on legal rights and no knowledge of wrongdoing<sup>32</sup> –

<sup>28</sup> *Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32 at 48.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid* at 46.

<sup>31</sup> P Butt, 'Indefeasibility and Sleights of Hand' (1992) 66 *ALJ* 596 at 597.

<sup>32</sup> To borrow the wording of Hayne J of the Supreme Court of Victoria in *Vassos v State Bank of South Australia* (1992) V ConvR 54-443 at 65,180-65,181.

should the goals of the Torrens system override the principles which permit a remedy being granted to an aggrieved individual.

***Garcia v National Australia Bank Ltd***<sup>33</sup>

In 1979, Mrs Garcia and her then husband executed a mortgage over their home. Ultimately, the National Australia Bank Ltd succeeded to the rights in respect of this mortgage. This mortgage, although initially for a loan of \$5,000 secured all moneys which the mortgagors might subsequently owe the mortgagee, including moneys owing under any guarantee that they might give. Between 1985 and 1987, the appellant signed a number of guarantees in favour of the National Australia Bank – the guarantees related to business activities controlled by her husband. In September of 1988, Mrs Garcia and her husband separated. She requested to the respondents that they keep the bank account within limits. Subsequently, the parties were divorced and Mrs Garcia sought a declaration that the guarantees that she had given were of no force or effect and void. Not surprisingly, the National Australia Bank Ltd sought to enforce them.

The trial judge<sup>34</sup> held that no moneys were owing under the mortgage. To this effect, (and despite the fact that she presented herself as a capable and presentable professional) he relied upon the rule in *Yerkey v Jones*.<sup>35</sup> Under this rule, a married woman was entitled to a presumption that the credit provider knows that she is under the undue influence of her husband, or is unaware of the nature and effect of the guarantee. If this presumption is not rebutted – the guarantee will be set aside. Furthermore, the trial judge held that Mrs Garcia was not entitled to relief under the principles of *Commercial Bank of Australia Ltd v Amadio*,<sup>36</sup> since the National Australia Bank Ltd did not have notice of any unconscionability by the husband.

The appeal by the National Australia Bank Ltd to the New South Wales Court of Appeal was successful.<sup>37</sup> The principle in *Yerkey v Jones* was no longer to be applied in New South Wales.<sup>38</sup> Similarly, as relief under the *Amadio* principle was unavailable, the plaintiff was unsuccessful. Special leave to appeal to the High Court was granted, principally on the challenge to its previous decision of *Yerkey v Jones*.

All judges of the High Court came to the conclusion that the plaintiff, Mrs Garcia, was entitled to her declaration that the mortgage was not enforceable. The majority of the High Court and Callinan J considered that the rule in *Yerkey v Jones* was still applicable within Australia today. The fact that a surety does not understand the nature and effect of a transaction; that the surety obtained no gain from the contract; that the lender understands that the wife may repose trust and confidence in her husband, and that the lender has not explained the transaction or to ensure that she received independent advice, led to a conclusion that it was unconscionable for the creditor to rely on the guarantee.<sup>39</sup>

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<sup>33</sup> (1998) 72 ALJR 1243.

<sup>34</sup> *Garcia v National Australia Bank Ltd* (1993) 5 BPR 11,996.

<sup>35</sup> (1939) 63 CLR 649.

<sup>36</sup> (1983) 151 CLR 447.

<sup>37</sup> (1996) 39 NSWLR 577.

<sup>38</sup> *Ibid* at 598.

<sup>39</sup> (1998) 72 ALJR 1243 at para 33.

This paper does not propose to analyse this judgment.<sup>40</sup> Rather, to put the hypothetical – assuming that the land was registered under the Torrens system, would the result have been different if the National Australia Bank Ltd had submitted that its mortgage was indefeasible because of the operation of that system of land registration.<sup>41</sup> In this context it is important to note that the conduct of the National Australia Bank could hardly have been described as fraudulent – given that this connotes something akin to personal dishonesty or moral turpitude,<sup>42</sup> or actual fraud, not what could be called constructive or equitable fraud.<sup>43</sup> As stated by the High Court in *Bank of South Australia v Ferguson*:<sup>44</sup>

Not all species of fraud which attract equitable remedies will amount to fraud in the statutory sense. The distinction may be illustrated as follows. In some circumstances, equity subjects the interest of a purchaser of unregistered land to an antecedent interest of which the purchaser has notice. However, in respect of land to which the [Torrens legislation] applies, registration of a transfer is not fraudulent in the statutory sense required to qualify the operation of the doctrine of indefeasibility, merely because the transferee knows that registration will defeat an antecedent unregistered interest of which the transferee has notice.

This is supported by the notice provisions of the legislation, which provides that a registered proprietor shall not be affected by notice, direct or constructive of any trust or unregistered interest, any rule of law or equity to the contrary, and that knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.<sup>45</sup>

Therefore, assuming that the National Australia Bank Ltd had notice of a interest held by Mrs Garcia, was there sufficient to found a personal equity, such that a claim in personam could be established. Is the arguable unconscionability of the bank in *Garcia* sufficient<sup>46</sup> to raise the equity. Consider what Moore has to say: “A vague and amorphous concept such as unconscionability would, if sufficient on its own to defeat a registered interest in land, drive a horse and buggy through the Torrens system. That is precisely the reason why the courts have insisted that the personal equity must be

<sup>40</sup> See T Cockburn, ‘Yerkey v. Jones: The Phoenix’s New Clothes’ (1998) 9 *Journal of Banking and Finance Law and Practice* 308; A Hanak, ‘The wife’s special equity survives the High Court’ (1998) 6 *Insolvency Law Journal* 202; S Hii, ‘From Yerkey to Garcia: 60 years on and Still as Confused as Ever!’ (1999) *APLJ Lexis* 3.

<sup>41</sup> Interestingly the majority of the High Court in *Garcia* refused to follow the English House of Lords decision in *Barclays Bank v O’Brien* (a decision which was accepted and modified by Kirby J in *Garcia*). As raised by P Milne, ‘Lenders, co-owners and solicitors’ (1999) 149 *New Law Journal* 168 at 168, “It is not apparent from the reports whether O’Brien involved registered or unregistered land. In any event, the approach set out in the case was clearly intended for general application. But the doctrine of notice does not operate in the context of registered land.”

<sup>42</sup> *Wicks v Bennett* (1921) 30 CLR 80 at 91.

<sup>43</sup> *Assets Co v Mere Roihi* [1905] AC 176 at 210.

<sup>44</sup> (1998) 151 ALR 729 at 732.

<sup>45</sup> *Land Titles Act* 1925 (ACT) s 59; *Real Property Act* (NT) ss 72, 186, 187; *Land Title Act* 1994 (Qld) s 184; *Real Property Act* 1886 (SA) ss 72, 186, 187; *Land Titles Act* 1980 (Tas) s 41; *Transfer of Land Act* 1958 (Vic) s 43; *Transfer of Land Act* 1893 (WA) s 134; *Real Property Act* 1900 (NSW) ss 43, 43A.

<sup>46</sup> Remembering of course that the trial judge had decided that there was no unconscionability: *Garcia v National Australia Bank Ltd* (1993) 5 BPR 11,996.



founded upon a recognised legal or equitable cause of action”.<sup>47</sup> In the context of restitution Birks considers that the multiplication of suits in this area derives from identifying the precise basis of the relief.<sup>48</sup> The relief in *Garcia* was granted on the basis that National Australia Bank was unconscientiousness in retaining the benefit of the guarantee, rather than unconscionability in the acquisition of the interest.<sup>49</sup> “But that kind of unconscientiousness ex post is itself fictitious... It does not tell us in an honest and straightforward way why we are sure that the lending bank ought to give up its security.”<sup>50</sup>

Nevertheless, the High Court has, on at least three known occasions, imposed a constructive trust in respect of unconscionable conduct that occurred in relation to Torrens land – these three cases being the seminal authorities of *Muschinski v Dodds*,<sup>51</sup> *Baumgartner v Baumgartner*<sup>52</sup> and *Bahr v Nicolay (No. 2)*.<sup>53</sup> But the one fundamental difference between these cases and the hypothetical under consideration is that, in those cases, the registered proprietors themselves acted unconscionably. Given this it would have been unfair to allow the registered proprietor to rely on indefeasibility to defeat the claim of the plaintiff.<sup>54</sup> However, it is a significant step from allowing a claim by a plaintiff in circumstances where the defendant has acted unconscionably, to a situation where there is a general jurisdiction to intervene in circumstances of unconscionability.<sup>55</sup>

Two recent cases, *Pyramid Building Society (in liq) v Scorpion Hotels Pty Ltd*<sup>56</sup> and *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd*<sup>57</sup> have suggested that necessary limitations within judicial interpretation must be adopted to ensure the sanctity of the Torrens system. The facts of these two cases shared an underlying similarity. In *Pyramid Building Society*, five individuals used their redundancy monies to form a company, Scorpion Hotels, to purchase a guesthouse. One of the five caused the guesthouse to be mortgaged to the Pyramid Building Society. The other members were not aware of the mortgage to Pyramid – the document being executed by the individual and his wife, the wife having no authority to undertake this transaction. The mortgage was registered under the Torrens system. Whilst the trial judge found the mortgage unenforceable,<sup>58</sup> the Victorian Court of Appeal held that the mortgage was valid and enforceable. The reasoning of the Court of Appeal was that Pyramid’s mortgage would have been indefeasible unless it had been guilty of fraud and that constructive notice of the fraud of the individual was not statutory fraud within the meaning of the Torrens legislation. Further, no personal equity could be raised against Scorpion.<sup>59</sup> Chambers<sup>60</sup>

<sup>47</sup> Moore (1998), *supra* n 1 at 260: though of course that it should be noted that he reconsidered some aspects of his view in a later piece: Moore (1999), *supra* n 1.

<sup>48</sup> P Birks, ‘The Law of Restitution at the End of an Epoch’ (1999) 28 *UWA Law Review* 13 at 27.

<sup>49</sup> *Ibid* at 28.

<sup>50</sup> *Ibid* at 29.

<sup>51</sup> (1985) 160 CLR 583.

<sup>52</sup> (1987) 164 CLR 137.

<sup>53</sup> (1988) 164 CLR 604.

<sup>54</sup> See the comments by Moore (1998), *supra* n 1 at 265.

<sup>55</sup> *Ibid*.

<sup>56</sup> [1998] 1 VR 188.

<sup>57</sup> [1998] 3 VR 133.

<sup>58</sup> (1996) 136 ALR 166 (TJ); [1998] 1 VR 188 (CA).

<sup>59</sup> [1998] 1 VR 188 at 196.

<sup>60</sup> *Supra* n 3.

considers that to follow this case would prove a “difficult road”<sup>61</sup> and that the exclusion of “rights generated by unjust enrichment would require a highly artificial and unsatisfactory barrier. It would also mean uprooting several well established principles”.<sup>62</sup> The response to this is that to allow these claims as an in personam exception involves an uprooting of the foundation principles of the Torrens system of land registration, and this, given the success of the Torrens system, must surely be undesirable.

In the *Macquarie Bank* case, the factual matrix was basically indistinguishable – the affixing of the company seal had been made by people who were not directors of the company. In this case and in *Pyramid*, the solicitors for the mortgagee did not check the signatures of the purported directors against the company search. The Victorian Court of Appeal in *Macquarie* accepted that even though the bank had the means of checking the attestation clause on the mortgage documentation with the information about the directors – there was no obligation to make this comparison. As commented by Tadmell J<sup>63</sup>

If the doctrine of constructive notice was held to apply generally to the ordering of priorities under the Torrens system it would, in effect, introduce into the scheme of title by registration the notion of priority determinable by reference to the doctrine of the bona fide purchaser for value without notice, a doctrine at odds with the Torrens system.

The significance of these two cases in the context of the present discussion is the important reaffirmation of the principles and policies that underlie the Torrens system. In both cases the mortgagee had registered their documentation – there was no obligation to make inquiries which could easily have established the fraud.<sup>64</sup> The in personam exception (and thus the raising of the personal equity) was to be limited by known legal or equitable causes of action. In support of this the court cited cases such as *Grgic v Australia and New Zealand Banking Group Ltd*<sup>65</sup> and *Garafano v Reliance Finance Corporation Ltd*.<sup>66</sup>

Accordingly, can it be said that the policy motivated relief<sup>67</sup> accorded to Mrs Garcia – an example of the rising importance of restitution, amounts to a known cause of action that is sufficient to raise an equity against the registered proprietor.<sup>68</sup> In an analogous context, it has recently been reiterated that indefeasibility of title can be used to override a right to rectify a transaction. In *Tanzone Pty Ltd v Westpac Banking Corp*<sup>69</sup> the

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<sup>61</sup> *Ibid* at 132.

<sup>62</sup> *Ibid*.

<sup>63</sup> [1998] 3 VR 133 at 152.

<sup>64</sup> As to whether wilful blindness would constitute a finding of fraud, Tadmell J didn’t decide. At [1998] 1 VR 133 at 146 his Honour had this to say: “I understand the expression to connote more than a failure to see or look: the adjective is to be given its due value. The compound expression connotes a concealment deliberately and by pretence, from oneself – a dissembling or dissimulation. In other words wilful blindness connotes a form of designed or calculated ignorance, of which none on the part of the appellant or its agents is proved.”

<sup>65</sup> (1994) 33 NSWLR 202.

<sup>66</sup> (1992) NSW ConvR 55-640.

<sup>67</sup> As described by Moore (1999) *supra* n 1 at 714.

<sup>68</sup> Birks, *supra* n 48 at 29 recognises that in many cases, the resolution of a dispute between a domestic borrower and a business lender involves a case of policy-motivated restitution.

<sup>69</sup> (1999) NSW ConvR 55-908.

original agreement between the lessor and lessee contained a rent review clause – which neither party appreciated would result in the amount of the rent escalating greatly over the term of the lease. The agreement did not reflect the true intent of the parties and rectification would normally have been available. However the lessor had sold to a purchaser who had obtained title by registration. The purchaser was fully aware that the agreement between the original lessor and lessee did not reflect the true intent of the parties. Despite this, registration granted the purchaser indefeasibility and thus the equity of rectification was extinguished.<sup>70</sup> Also consider the New Zealand decision of *Davies v Laughton*.<sup>71</sup> The Laughtons had provided a second mortgage over their property to assist their son – who was purchasing the importing business of the appellants. The respondents signed the mortgage, prepared by the solicitor of the son. At a subsequent date, the solicitor for Laughton’s son altered the mortgage (at the request of solicitors for Davies) with the result that the mortgage was collateral to a first, not a second, debenture. The mortgage was registered. The appellants sought the discharge of an interim injunction preventing them from selling the home. The New Zealand Court of Appeal held that Davies was unable to rely on indefeasibility of title to defeat any claim by the Laughtons that the mortgage had been registered without their consent. “In short, equity’s protection over sureties defeated the registered mortgage.”<sup>72</sup>

The conscience of a mortgagee who, unbeknown to the mortgagor, alters the terms of the debtor's obligations which the mortgage is to secure, must be pricked as assuredly as if the alteration were made after settlement... A hapless guarantor who has been exploited in this way is just as entitled to the protection of a Court of Equity as one whose liability has been altered following settlement or registration.<sup>73</sup>

### **Bringing the strands of indefeasibility and policy motivated relief together**

It seems to their Lordships that the learned judges... have been too much swayed by the doctrines of English equity, and not paid sufficient attention to the fact that they are here dealing with a totally different land law, namely a system of registration of title contained in a codifying enactment.<sup>74</sup>

There is no doubt that the imposition of equitable doctrines seriously inroads into the concepts that underlie the Torrens System. But what balance is to be achieved? Few of us would argue that indefeasibility of title should not be used to defeat a claim, where the registered proprietor has not only notice of an interest, but has given an express

<sup>70</sup> See the brief note on this case: P Butt, ‘Rectification thwarted by indefeasibility’ (2000) 74 *ALJ* 280 where he notes that the different wording of the Victorian legislation may have led to a different result: Section 42 of the *Transfer of Land Act* 1958 excluding from the doctrine of indefeasibility, the “interest of a tenant in possession of the land.”

<sup>71</sup> [1997] 3 NZLR 705 (CA).

<sup>72</sup> E Toomey, ‘Certainty of title in the Torrens System – Shifting Sands as the Millennium Approaches’ Paper delivered to 1999 Real Property Law Teachers Conference – The Flinders University Law School, 30 September 1999 – 2 October 1999.

<sup>73</sup> [1997] 3 NZLR 705 at 714-715 per Thomas J.

<sup>74</sup> *Haji Abdul Rahman v. Mahomed Hassan* [1917] AC 209 at 216 per Lord Dunedin (Privy Council). S Hepburn, ‘Concepts of Equity and Indefeasibility in the Torrens System of Land Registration’ (1995) *APLJ Lexis* 8 at 1 also states: “The ambiguous and pejorative nature of equity does not fit easily into a statutory structure centred around the guarantee of land title upon registration. Indefeasibility of title upon registration necessitates a level of certainty and determination which is, in many ways, directly oppositional to the approach taken by equitable principles of fairness.”

assurance that the interest would be recognised and protected. Nevertheless, the balance needs to be made between the certainty, security, and simplicity of the Torrens system on one hand and the fairness and discretionary nature of equitable jurisdiction on the other. Whilst most would accept the result in *Bahr v Nicolay (No. 2)*;<sup>75</sup> many more of us question<sup>76</sup> the reasoning of the New South Wales Supreme Court in *Mercantile Mutual v Gosper*.<sup>77</sup>

Consider now the decision of *Garcia v National Australia Bank Ltd.*<sup>78</sup> Had the bank acted unconscionably? Certainly the High Court considered so. Support for its conclusion that the conduct of the National Australia Bank was unconscionable (even though the trial judge thought otherwise) lay in analogies to the recognised jurisdiction of the court to set aside gifts made by a mistaken donor,<sup>79</sup> the ability to provide relief to a surety where some particular fact is not made known,<sup>80</sup> and where the creditor has not disclosed some material features of the transaction.<sup>81</sup> Having said this however, “[d]espite the attempt by the majority in *Garcia* to justify the decision in terms of unconscionable conduct on the part of the bank, the better view is that unconscionability cannot explain the result in *Garcia* itself”.<sup>82</sup> If this is correct, and I would suggest that it is,<sup>83</sup> then any restitutionary claim which policy dictates should be successful will give rise to a personal equity that can potentially infringe the operation of the Torrens system. Is this desirable?<sup>84</sup> Does the allowance of this type of claim permit the flexibility and discretion that is needed within a land registration system that demands certainty and stability? Are we eating away at the crumbling foundations of Torrens, or providing the flexibility within the building itself so that it can meet the changes resonating through society? Is the “justifiable aim of controlling a species of transaction... achieved by damaging and diluting established doctrines”?<sup>85</sup>

## Conclusion

There is no doubt that the Torrens system, as a form of land registration, has been an unqualified success in Australia.<sup>86</sup> It has introduced a conveyancing system which is reliable, simple, cheap, speedy and suited to the social needs of the community.<sup>87</sup> Further, and specifically in respect of claims made in personam, it could be argued that it preserves the concepts of contract and equity,<sup>88</sup> but as Deane J states:

<sup>75</sup> (1988) 164 CLR 604.

<sup>76</sup> See for example P Butt, ‘Indefeasibility and Sleights of Hand’ (1992) 66 *ALJ* 596.

<sup>77</sup> (1991) 25 NSWLR 32.

<sup>78</sup> (1998) 72 ALJR 1243.

<sup>79</sup> *Ibid* at para 35.

<sup>80</sup> *Ibid* at para 37.

<sup>81</sup> *Ibid* at para 36.

<sup>82</sup> Moore (1999), *supra* n 1 at 714 quoting from Gardner, ‘Wives Guarantees of their Husbands’ Debts’ (1999) 115 *LQR* 1 at 3-4.

<sup>83</sup> See R Baxendale [1999] 21 *Sydney Law Review* 313 at 319-320.

<sup>84</sup> See S Hepburn, *supra* n 74 at 8.

<sup>85</sup> [1997] All ER Rev 385 at 394.

<sup>86</sup> Whalan, *supra* n 4.

<sup>87</sup> M A Neave, C J Rossiter & M A Stone, *Sackville and Neave Property Law Cases and Materials*, 6<sup>th</sup> edn Butterworths 1999 at 418.

<sup>88</sup> As noted by J G Tooher, ‘Muddying the Torrens Waters with the Chancellor’s Foot? *Bahr v Nicolay*’ (1993) 1 *APLJ* at 1.

Long before Lord Seldon's anachronism identifying the Chancellor's foot as the measure of Chancery relief, undefined notions of 'justice' and what was 'fair' had given way in the law of equity to the rule of ordered principle which is of the essence of any coherent system of rational law. The mere fact that it would be unjust or unfair in a situation of discord for the owner of a legal estate to assert ownership against another provides, of itself, no mandate for a judicial declaration that ownership in whole or in part lies, in equity, in that other.<sup>89</sup>

This ideal must be met – notions of what is fair or just must give way to the rule of ordered principle. To this end, the fundamental tenet of indefeasibility of title represents this rule. It is only from this genesis that the modifications and qualifications to the principle should be articulated and justified. To do otherwise leaves the imprint of the Chancellor's foot on recognised doctrines and fundamental tenets of Property Law. If, contrary to the statements of the High Court in *Garcia*, it is accepted that the basis of the result in that case was not unconscionability but, policy-motivated relief, the end result for the Torrens system of land registration is that this policy-motivated restitutionary relief<sup>90</sup> affords a recognised cause of action that supports the personal equity necessary for an in personam claim.

Is this acceptable? Only, I would suggest, if the circumstances of the case are explained as a modification or qualification to the fundamental tenet of indefeasibility. These circumstances must be articulated and justified as an anomalous exception to the critical imperatives of the Torrens system. To do otherwise leaves the law without any broad unifying principle and with the consequential practical difficulty of providing adequate and clear advice to subsequent clients.

A better system of land registration for Australian conditions than the Torrens system has not been devised. Its fundamental doctrines need be reinforced not qualified. Any analysis of a case involving Torrens land should start from the fundamental precepts of indefeasibility of title and the irrelevancy of notice – if these are to be waived, the justification for this action must be established. In doing this, the courts need to articulate the reasons for the departure, but importantly, also indicate that it is an isolated departure from the 'house of Torrens' and its foundations.

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<sup>89</sup> *Muschinski v Dodds* (1985) 160 CLR 583 at 616.

<sup>90</sup> Birks *supra* n 48 at 30 describes the problems encountered in *Garcia* as "incredibly difficult" and there is a need to avoid "pseudo-solutions and, in particular, not to go in for distorting or denaturing particular unjust factors."

# The Assurance Fund: Government Funded or Private?

LYNDEN GRIGGS\*

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*The assurance fund is often seen as an essential component of the Torrens system. However, can an economics/law analysis support this? The inquiry raised by this article is whether private insurance, taken out by those parties who desire to protect their interest, would be a cheaper and superior way to compensate those adversely affected by the concept of indefeasibility of title. The conclusion is that the government funded assurance system does comfortably sit as one of the critical elements of the Torrens system.*

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## Introduction

"The [assurance] fund is thus the logical component of certainty of title whereby a lost right can be 'converted into hard cash'."<sup>1</sup>

"The Russian legislature has wisely avoided assurance fund costs, which are often a disadvantage of title registration systems."<sup>2</sup>

The contemporary Torrens system has, in much of Australia, three major components: the mirror (the register accurately reflects the true state of the title); the curtain (those undisclosed interests that sit behind the title do not impact upon the registered proprietor); and the indemnity (those who suffer loss as a result of

the operation of the fund are compensated from its assurance provisions).<sup>3</sup>

This article examines one aspect of this system, the assurance fund. The effectiveness, rationale, and operation of this part of the Torrens system being sharply brought into focus by the recent legislative amendments in New South Wales.<sup>4</sup> This legislation alters the focus of the fund from that of assurance-based principles to a truly compensatory insurance scheme,<sup>5</sup> but as the two passages quoted above demonstrate, academic views as to the validity and efficacy of the assurance fund can be sharply divided. How can this divide be analysed and a justification made for a solution either way?

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<sup>1</sup> Mitchell, "Torrens Title Compensation for Loss: the Real Property Amendment (Compensation) Act 2000" (2001) 9 APLJ 40 at 40 quoting from Stein and Stone, *Torrens Title* (Butterworths, Sydney, 1991), p 349.

<sup>2</sup> Batalov, "The Russian Title Registration System for Realty and its Effect on Foreign Investors" (1998) 73 Wash L Rev 989.

<sup>3</sup> As noted in McCormack (1992) 18 WMLR 61 at 81: "The basic goal is to make the governmentally maintained record a conclusive statement of ownership and the condition of title. This conclusive statement is intended to function as a 'mirror' of the true state of the title and as a 'curtain' between the present and the past which should make it unnecessary to conduct the kind of historical searches performed in recording systems."

<sup>4</sup> *Real Property Amendment (Compensation) Act 2000* (NSW).

<sup>5</sup> Mitchell, op cit n 1 at 6-7.

This article seeks to examine the contrasting arguments and make a principled justification for either the retention, or indeed the abolition, of the assurance fund. However, this analysis will differ from that of other approaches, in that it will look at the matter by way of an economics/law methodology; the importance of this path being that the assurance fund represents the allocation of public funds. Does this discipline provide substantive support for the introduction of an assurance fund?

The critical need for this type of evaluation lies in the necessity to continually re-assess the operation of our public institutions, and the manner and cost-efficiency of how they operate. This, fundamental in an era where governments are continually striving to reduce their regulatory functions, and, subsequent to this, requiring private industry or the market to be the arbiter of economic and social efficiency.

### Why was the assurance fund introduced?

"[T]he principle of compensation as enacted can perhaps be based on solid theoretical grounds as an integral part of a system of registration of title.

A study of the present provisions in the statutes perhaps yields two reasons for their enactment ... First, the provisions were designed to compensate any person sustaining loss through omission, mistake or misfeasance of the Registrar or any of his officers. Secondly, and perhaps this is more important, the provisions are a 'corresponding counterpart to the indefeasible title which the Act sets out to confer on the registered proprietor'."<sup>6</sup>

Despite this arguably strong theoretical foundation, the truth appears to be that the assurance fund provisions were introduced to overcome the hostility of the legal profession and to provide the administrators with some shield

consequent upon the introduction of a state-mandated system.<sup>7</sup> Given this obviously practical, but theoretically thin support, and the fact that they have been "virtually inaccessible" to people suffering from the operation of the system,<sup>8</sup> can their existence be supported? What principles should underlie the system of compensation and, given that some jurisdictions do not have an assurance fund,<sup>9</sup> can it be said that one is fundamental? This facet will be central to the thesis explored here.

The importance of this examination is heightened by the increasing moves towards automation of the Torrens system.<sup>10</sup> Will this mechanisation result in an increase to the level and depth of the claims made against the assurance fund?<sup>11</sup> As Hammond notes,<sup>12</sup> with

<sup>7</sup> See Woodman and Grimes, *Baalman on the Torrens System in New South Wales* (Law Book Co, Sydney, 1974), p 389.

<sup>8</sup> Stein and Stone, *op cit* n 1, p 349. An assurance fund was originally constituted by way of a contribution of one-half penny in the pound on the value of land brought under the Act. See Petrow, "Responses to the Torrens System in Tasmania 1862 to 1900" (1997) 5 APLJ 194 at 197.

<sup>9</sup> For example, the Northern Territory, Israel, Germany and Austria do not have an assurance fund despite being Torrens-based; see generally, Tebbutt, "The Torrens System Assurance Fund in New South Wales" (1981) 55 ALJ 150; Batalov, *op cit* n 2 at 1013-1014; see also Simpson, *Land Law and Registration* (Cambridge University Press, 1976), p 181 (indicates that Fiji, Malaysia and British Honduras also do not have an indemnity scheme).

<sup>10</sup> For example, in New South Wales, 98.5% of all titles had been computerised by mid-1999, with the intent that all services will be available electronically by the end of 2001. Queensland and South Australia have also announced plans to fully automate their registration systems.

<sup>11</sup> As noted in Neave, Rossiter and Stone, *Sackville & Neave Property Law Cases and Materials* (Butterworths, Sydney, 1999), p 493: "Partly because of the funds' historical state of 'indecent solvency' (which may not continue as they become exposed to more substantial claims)."

<sup>12</sup> Hammond, "The Abolition of the Duplicate Certificate of Title and its Potential Effect on Fraudulent Claims over Torrens Land" (2000) 8 APLJ 115.

<sup>6</sup> Whalan, *The Torrens System in Australia* (Law Book Co, Sydney, 1982), p 345.

all jurisdictions facilitating the computerisation of information in land transactions,<sup>13</sup> the abolition of the duplicate certificate of title (a concomitant part of any electronic system) may increase the potential for third-party fraud.

By contrast, Smith<sup>14</sup> (in the English context) considers that as indemnity costs less than one-fifth of one per cent of Land Registry income, recovery from the fund could be increased dramatically without markedly increasing the fees charged to users of the system.

Whatever may be the result in terms of claims made against the assurance fund by electronic data lodgment, at the outset it is critical to note what the assurance fund does not do. Correctly speaking, the fund does not guarantee the title on the Register, rather it indemnifies if the operation of the Torrens system causes loss.

"The State undertakes an original and independent obligation or indemnity; it undertakes to pay compensation if the operation of the register causes loss. It does not explicitly guarantee the title ... ."<sup>15</sup>

At its core, it spreads the loss occasioned by any defalcation, over all users of the system. It effects a loss-spreading function, as well as shifting the loss from what would have been the position under general law. Thus, in a simple example,<sup>16</sup> where the solicitor of A forges the signature of her client B (the owner of Landacre) to a conveyance in favour of C, different results occur between general law and Torrens title land. With general law, the instrument is a forgery and thus void. B would be entitled to reclaim the property,

with C left to have a remedy against A. By contrast, under Torrens title, if C registers her interest, she will obtain the benefits of indefeasibility,<sup>17</sup> with B having a possible claim against the assurance fund. Thus, Torrens effects a shift in where the loss will fall, but also spreads the loss amongst the users of the system.

"The Torrens system can be seen, therefore, to introduce a new set of priority, and therefore loss-shifting, rules. To this extent, there is nothing special about the Torrens system: priority rules generally exist to determine who loses out in a competition in respect of all types of property. The uniqueness of the Torrens system, however, lies in the fact that it supplements its loss-shifting rules with loss-spreading rules."<sup>18</sup>

It is this issue, which is to be addressed. Does this uniqueness of a combination of loss-shifting rules with loss-spreading rules comply with an economics/law analysis?

### An economics/law critique

An analysis of this nature starts from the premise that scarce resources should be put to their highest value use. The legislation and common law should adopt that system which results in the least cost and the greatest benefits to society. As the scant resources of society are better allocated, a greater number of desired benefits can flow to the community.<sup>19</sup>

In the context of this article, the question is the extent to which the Torrens system, and one of its central planks (that of the assurance fund, relying as it does on public funds) utilises those

<sup>13</sup> For an overseas development on this aspect see Law Commission (UK), *Land Registration for the 21st Century: A Conveyancing Revolution*, LawCom No 271 (2001).

<sup>14</sup> Smith, "Land Registration Reform: The Law Commission Proposals" [1987] *Conveyancer & Property Lawyer* 334 at 343.

<sup>15</sup> Simpson, *op cit* n 9, p 175.

<sup>16</sup> Example taken from NSW Law Reform Commission (NSWLRC), *Torrens Title: Compensation for Loss*, Report 76 (1996), par 2.2.

<sup>17</sup> The indefeasibility provisions of the relevant legislation are as follows: *Transfer of Land Act 1958* (Vic), s 42; *Land Titles Act 1925* (ACT), s 58; *Real Property Act 1900* (NSW), s 42; *Real Property Act* (NT), s 69; *Land Title Act 1994* (Qld), s 184; *Real Property Act 1886* (SA), s 69; *Land Titles Act 1980* (Tas), s 40; *Transfer of Land Act 1893* (WA), s 68.

<sup>18</sup> NSWLRC, *op cit* n 16, par 2.4.

<sup>19</sup> See Trebilcock, "An Introduction to Law and Economics" (1997) 23 MULR 123 at 125.



resources to their highest value use.<sup>20</sup> By moving from a system of individual liability and responsibility under "old system" title to, what is in principle, a compulsory allocation of loss across all members of society, have we adopted a scheme that can be supported?

The difference in policy of Torrens as against general law can be starkly illustrated. With Torrens, the assurance fund compensates the wrongfully deprived, and previously registered proprietor; this fund built up from contributions pursuant to transfers of land,<sup>21</sup> the imposition of fees and charges from the operation of the Land Titles Office, or simply from consolidated revenue. By contrast, under the general law the wrongfully deprived purchaser will have legal recourse to the wrongdoer with all the attendant problems that may exist, such as the wrongdoer being out of the jurisdiction or insolvent.

"The critical issue, the recovery of the loss and the identity of the titleholder are very different. In one, the loss is spread amongst all members of the community, in the other, recovery of loss is predicated on the ability to identify and successfully recover from the wrongdoer."<sup>22</sup>

In essence, the registration process simplifies transactions but at the cost of destroying "formal legal rights".<sup>23</sup> In economic terms, what has been done is to suggest that the transaction costs (or the obstacles to bargaining) associated with claiming from the assurance fund are less than what they would be if the system of compensation was somehow privately administered, for example, through insurance.

<sup>20</sup> See Janczyk, "Land Title Systems, Scale of Operations, and Operating and Conversion Costs" (1979) 8 J of Legal Studies 569 esp at 582 (economic comparison of "old system" title with Torrens title); see also Ontario Law Reform Commission, *Report on Land Registration* (Dept of Justice, 1971), pp 135-151.

<sup>21</sup> See Petrow, op cit n 8 at 197.

<sup>22</sup> Griggs, "Torrens Title in a Digital World" (2001) 8(3) Murdoch Univ Electronic J of Law at [13].

<sup>23</sup> Rose, "Property and Expropriation: Themes and Variations in American Law" (2000) Utah L Rev 1 at 7-8.

Society has adopted a system whereby the transaction costs associated with the assurance fund are seen to be lower than what could be offered by private insurance. For that reason, the solution in Torrens is to protect the person who has achieved registration and to compensate the innocent party with the loss spread over the entire community through a government funded insurance scheme.

However, can this be justified? Should the loss fall on the state, or would there be greater savings to be made by shifting and placing the loss on one private individual, and that person accepting the loss themselves or seeking to insure against possible damage? Does an economics/law analysis support this approach that we have, to a large extent, blindly accepted since the origins of the system. To undertake this analysis, a structure is required, and Duggan provides this.<sup>24</sup> Three aspects must be considered:

- (a) the role of the market;
- (b) who can most easily avoid the loss?; and
- (c) the low cost administrative option.<sup>25</sup>

### *Role of the market*

Does the market support that compensation be paid by the state from the assurance fund, or could private companies supply title insurance more cheaply? The New South Wales Law Reform Commission, in its analysis of the compensation fund provisions, briefly considered

<sup>24</sup> Duggan, "Personal Property Security Interests and Third Party Disputes: Economic Considerations in Reforming the Law" in Gillooly (Ed), *Securities over Personality* (Federation Press, Sydney, 1994), p 234 (Duggan was obviously considering the matter from a personal property perspective, however, the framework can also be adopted for the provisions under discussion); see also *ibid*, p 248 at n 46 (it is sometimes argued that relevant consideration is ability of respective parties to insure against risk of loss, but that this is indeterminate, one of the principal reasons being that availability of insurance is relative to risk confronting the party and size of risk is function of the choice of legal rule).

<sup>25</sup> *Ibid*, p 246.

this option.<sup>26</sup> This report, whilst extensively canvassing the options for reform of the compensation provisions, did not, however, seek to undertake an economic analysis of the Torrens system. Nevertheless, in canvassing the possibility of private title insurance being obtained by the registered proprietor, it made the following comment:

"in the United States, title insurance is integral to the conveyancing system to cover not only losses which result under a Torrens system, but also to indemnify losses which result from serious deficiencies in the title systems in the North American jurisdictions and solicitors' negligence. The different and broader purpose of title insurance in those jurisdictions is the reason for the payment of a substantial single premium"<sup>27</sup>

Lobel<sup>28</sup> takes this further:

"The modern title insurance company [that is evident in the United States] is a perfect example of how an antiquated system spawns the growth of an unnecessary industry. Title insurance companies perform the service of searching the records and of insuring the home owner and lender against the possible risk of loss. In essence, their business is to sell insurance to protect against the possibility a title was negligently searched ... The setting of rates is also irrational ... if owner A buys a house one year and purchases title insurance and then sells the house the following year to owner B, both A and B normally pay the full amount of the insurance."<sup>29</sup>

Moreover, the overseas experience is that title insurance is a very profitable business; total losses as a percentage of premiums averaging around 2.5 per cent.<sup>30</sup>

<sup>26</sup> NSWLRC, op cit n 16.

<sup>27</sup> Ibid, par 4.14.

<sup>28</sup> Lobel, "A Proposal for a Title Registration System for Realty" (1977) 11 Univ Richmond L Rev 501.

<sup>29</sup> Ibid at 507.

<sup>30</sup> See Burke, "Conveyancing in the National Capital Region: Local Reform with National Implications" (1973) 22 American Univ L Rev 527 at 534-535.

Notwithstanding these criticisms of the private title insurance industry, once all titles in Australia have been converted to Torrens, it is suggested that it may be apposite to consider a system of private insurance. When this completion to Torrens occurs, private industry may be able to competitively price a policy so that the registered proprietors can, in fact, decide (as they do now with other forms of insurance such as car insurance, house and contents insurance, income support insurance) as to whether they wish to protect against the risk of loss.<sup>31</sup>

Once the conversion is complete, the possibility for error should be substantially reduced, given that many of the claims arise from the conversion of general law to Torrens land, as well as mistakes in the transposing of documents.<sup>32</sup> Further, the move towards electronic data lodgment, if handled correctly, should result in the reduction of claims made against the assurance fund.<sup>33</sup>

The issue will then become one of whether the private insurance industry can reduce the cost to the public purse of the administrative function of maintenance of the compensation provisions, this leading to a reduction in the fees and charges paid by users of the system. The significance of this is that the resources of the public purse can then be freed to a higher value, or more socially-beneficial use.

In addition, it could be submitted that the present operation of the government funded system may lead to individuals not exercising the same level of care with, for example, the certificate of title, than they would if each individual had to undertake the expense, or take the risk, of insuring or not insuring respectively. Thus, by having a compulsory government

<sup>31</sup> See Rose, "The Shadow of the Cathedral" (1997) 106 Yale LJ 2175 (Torrens title can be considered as ownership subject to an option; that option being the possibility that someone else will be able to register an interest and gain priority over a previous interest).

<sup>32</sup> See Griggs, op cit n 22.

<sup>33</sup> Ibid; cf Hammond, op cit n 12.

funded scheme (admittedly funded through fees, charges and taxes) has society encouraged a certain laxity with the critical documents of Torrens, most notably the certificate of title? As Hammond notes:

"The overwhelming majority of registered fraudulent dealings over Torrens land are committed by people acquainted with the registered proprietor with access to the duplicate certificate of title, namely family members, or trusted agents, such as solicitors and mortgage brokers."<sup>34</sup>

In view of this, would the imposition of a direct cost (through private insurance) on each home owner bring home the issue of safety with the certificate of title? To this end, the recent New South Wales legislation<sup>35</sup> has provided that a person who has suffered loss from their own negligence will have the amount of their claim reduced accordingly.

Whilst it is obviously difficult to draw any conclusions, one suspects that the imposition or a private insurance burden would have very limited impact; the extraordinary success of the Torrens system contributing to the relative comfort of society with its existing procedures. In addition, unless a significant programme of community education accompanied the introduction of a private insurance scheme, the public would remain blissfully ignorant of the importance and role of the certificate of title. Finally, the overseas experience would suggest that market considerations favour the retention of the government funded assurance system.

"An economic analysis suggests that courts should be cautious about extending the availability of compensation to persons who have not adequately safeguarded their interests."<sup>36</sup>

<sup>34</sup> Ibid at 129.

<sup>35</sup> See also *Transfer of Land Act 1958* (Vic), s 110(3); *Real Property Act 1886* (SA), s 216.

<sup>36</sup> O'Connor, Neave and Hughson, "Peeping through the Curtain: The Purchaser's Duty to Inquire" (Paper delivered at Real Property Law Teachers Conference, Adelaide, 30 September 1999), at 10.

### *Who can most easily avoid the loss?*

Who is better able to avoid the losses that occur with the operation of Torrens? Is it the government through its Land Titles Office, or do we, as individuals, have the capacity to significantly reduce the level of claims made against the assurance fund.

In other words, who can better protect themselves against problems that occur? Is it cheaper for the Land Titles Office to avoid the loss, or would it be simpler for the registered interest holder to protect herself or himself, either by taking greater care in the protection of the vital documents, or through private insurance. Again, the evidence suggests that it is the Land Titles Office that can more easily avoid the loss.

An analysis by Hammond,<sup>37</sup> of the types of claims made against the assurance fund, indicates that the majority of claims made against the assurance fund result from errors extraneous to the registered proprietor; largely from internal office irregularities. Given this, it would seem appropriate, and also involve the utilisation of fewer resources, if the Land Titles Office were the organisation required to undertake the loss-avoidance considerations. Furthermore, with the move towards electronic conveyancing,<sup>38</sup> office errors may be reduced significantly.<sup>39</sup>

Thus, if less wastage occurs by the Land Titles Office acting appropriately to guard against claims, then it is fitting that the present situation be maintained. Conversely, if it could be demonstrated that the registered proprietor could more cheaply protect their position, then it would be proper for a private system of protection to be introduced.

However, the suggestion would be that the cost of private insurance, as previously indicated, would not lead itself to a better use of the scarce

<sup>37</sup> Hammond, op cit n 12.

<sup>38</sup> See Cocks and Barry, "Electronic Conveyancing: Challenges for the Torrens System" (2001) 8 APLJ 270.

<sup>39</sup> Griggs, op cit n 22.

resources. To this end, the role that the certificate of title plays in allowing fraud will be decisive. At present, the existence of a certificate of title appears to assist those close to the registered proprietor to commit fraud<sup>40</sup> whilst acting as some form of safeguard against third-party fraud.<sup>41</sup> Given this, the safeguards will need to be instituted as society inescapably moves towards the abolition of certificates of title<sup>42</sup> so that the level of fraud does not increase with electronic data lodgment.

### *Low cost administrative option*

This refers to the “cost to society of policing and enforcing a particular rule”.<sup>43</sup> Accordingly, the inquiry is whether it is simpler for the Land Titles Office to administer the assurance fund or would it be preferable for private insurers to oversee its operation.

With private insurance, there is no doubt that the cost of managing the system would be passed on to the parties obtaining the policy. With the government system, the cost is borne with the fees and charges paid, as well as the taxes that form part of the consolidated revenue. In this respect, it is probably correct to say that the cost is more equitably shared with a government assurance fund. Some, if not a significant portion of the population would refuse to take out private insurance.<sup>44</sup>

Therefore, as with the preceding matters, it would appear easier for the Land Titles Office to be the primary manager. As indicated, the majority of problems emanate from within the Land Titles Office; given this, it would seem

less costly to have that office administer the claims.<sup>45</sup> The cost to society of policing and enforcing Torrens cheaper with the present managers.

### **Conclusion**

The analysis undertaken here favours the present system. However, this, on its own, is not sufficient to justify the retention of what we presently have. The system must also be workable. To this end, the founders of the Torrens system were eminently practical. To placate the vociferous opposition of the legal profession to the notion of indefeasibility of title – the central plank of Torrens – an assurance fund was put in place to compensate those affected. As a result, whilst the introduction of the assurance fund may not have been based on some rational basis, it was designed to ensure that the system at least had the opportunity to begin its journey. Today, with approximately 140 years of that journey having been spent, we see that, by and large, the system has worked tremendously well.

The assurance fund, as a attendant part of that system has served it well – this, despite the barriers to its successful working – the narrow interpretation of the legislation by the courts,<sup>46</sup> the “quite repulsive tenacity with which some jurisdictions are prepared to resist even valid claims upon the fund”,<sup>47</sup> the delay in the paying

<sup>40</sup> See *Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32.

<sup>41</sup> See Hammond, op cit n 12 at 130.

<sup>42</sup> Certificates of title are now optional in a number of jurisdictions: see *Land Title Act 1994* (Qld); *Transfer of Land Amendment Act 1996* (WA).

<sup>43</sup> Duggan, op cit n 24, p 248.

<sup>44</sup> For example, it is estimated that 30% of Australians do not have any building or contents insurance.

<sup>45</sup> See NSWLRC, op cit n 16, par 4.12: “the interposition of an independent body to deal with claims would be relatively more costly than allowing the Land Titles Office to deal with claims because of that Office’s familiarity with the nature of the claims and understanding of the issues in dispute. It was also suggested that care should be taken not to allow risk management policies to relax to the point where increased litigation results.”

<sup>46</sup> See, eg *Registrar of Titles (WA) v Franzone* (1975) 132 CLR 611; *Armour v Penrith Project Pty Ltd* [1979] 1 NSWLR 98.

<sup>47</sup> NSWLRC, op cit n 16, par 2.40 (quoting from the Issues Paper of the Law Reform Commission).

of claims,<sup>48</sup> and the poor drafting of the compensation provisions.<sup>49</sup> Despite all these barriers, the assurance fund, particularly with the redrafting of the provisions such as has occurred with the *Real Property Amendment (Compensation) Act 2000* (NSW), should continue to serve the Torrens system, and serve it well.

Interestingly, what the analysis undertaken in this article has shown is that this part of the system can be justified on an economic/law

analysis. Overseas experience indicates that the price asked by private insurance for protection against loss of title is expensive, that the assurance fund administered by the government funded institution is the lowest cost option and that it is the cheapest to administer.

Arguably Australia's best export,<sup>50</sup> the Torrens system, still maintains its relevance in contemporary Australia. Importantly also, it can be explained and justified by a multitude of research methodologies – in this instance, economics/law.

<sup>48</sup> See, eg *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146 (the High Court decision coming nine years after the compensation claim was commenced).

<sup>49</sup> See NSWLRC, op cit n 16, par 2.56.

<sup>50</sup> Large parts of Europe, Asia, the Pacific region, Great Britain, and Canada having adopted a form of Torrens.



# ‘The Tectonic Plate of Equity — establishing a fault line in our Torrens landscape’

Lynden Griggs\*

The decision of the Queensland Court of Appeal in *Tara Shire Council v Garner, Arcape & Martin* [2002] QCA 232.

## Introduction

Sir Robert Torrens considered that equitable interests should have no role to play in the administration of Torrens land. They were to be regarded as mere contracts<sup>1</sup> — any function that the Court of Chancery was to have in the regulation of conveyancing transactions was to be diminished, if not eliminated.<sup>2</sup> To this end, the recent decision of the Queensland Court of Appeal in *Tara Shire Council v Garner, Arcape and Martin*<sup>3</sup> demonstrates that, in one respect, the vision of Sir Robert has been not been fulfilled. This case, as Atkinson J noted: brought ‘into sharp relief the great tectonic plates of law and equity as they grind against each other and struggle to settle into a stable position in the substratum of Australia’s legal landscape’.<sup>4</sup> Unfortunately in my view, (and I suspect Sir Robert may share the same opinion), a majority of the Queensland Court of Appeal considered that notions of inherent fairness and justice could not be undermined by the larger picture of stability and certainty that is promoted by the notion of indefeasibility.<sup>5</sup> While the intent of the scheme was to:

... give security and simplicity to all dealings with land by providing that the title shall depend upon registration, that all interests shall be capable of appearing or being protected upon the face of the registry, and that a registered title or interest shall never be affected by any claim or charge which is not registered . . .<sup>6</sup>

a decision such as *Tara Shire Council* (the council) indicates that we are significant way from achieving this goal. The importance of this judgment,

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1 M Hughson, M Neave and P O’Connor, ‘Reflections on the Mirror of title: Resolving the Conflict between Purchasers and Prior Interest Holders’ (1997) 21 *Melbourne University Law Review* 460 at 461.

2 See the comments by L A McCrimmon, ‘Protection of Equitable Interests under the Torrens System: Polishing the Mirror of Title’ (1994) 20 *Monash Law Review* 300 at 301.

3 [2002] QCA 232.

4 Above n 3 at para 80.

5 Of course, indefeasibility being a central plank of Torrens — it being expressly provided for in a number of Torrens statutes — see Land Title Act 1994 (Qld), ss 38, 169, 170; Real Property Act 1886 (SA), ss 10, 69; Land Titles Act (Tas), s 40.

6 Opening Statement in the Report of the Real Property Law Commission in November 1861 (SA): Parl Paper No 192 (1861). Sir Robert Torrens was one of the Commissioners. For a discussion of the history behind the legislation, see D Pike, ‘Introduction of the Real Property Act in South Australia’ (1960) 1 *Adel LR* 169.

and the consequential need for this discussion lies in the majority's acceptance of the overarching reach of equitable interests. In doing so Atkinson J and McMurdo P have disagreed with the majority view of the Victorian Court of Appeal in *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd*.<sup>7</sup> Once again, our Federal system of jurisprudence has led to divergences between State courts — the impetus for a national system of land regulation must surely grow.

### **Facts of *Tara Shire Council v Garner, Arcape and Martin***<sup>8</sup>

In January 1987, the Garners became the registered proprietors of land on which was situated a motel, restaurant, newsagency, petrol station and a water bore. It was this water bore that was to become the object of the dispute.<sup>9</sup> In August 1987, the council made an offer to purchase that part of the land on which the water bore was located. This required that the land be subdivided. The relevant subdivisional plans were completed and in March 1988, the council paid \$65,000 for the purchase of the land on which the water bore was situated. The Garners allege that they signed and delivered a memorandum of transfer over this land — this was denied by the council. This factual dispute was not resolved, however the end result was that the Garners remained the registered proprietor of the land over which the water bore was located, as well as the land on which the motel was situated. In November 1989, the Garners entered into a contract with Arcape whereby Arcape was to purchase the motel, licensed restaurant, newsagency, and petrol station. In February 1990, Arcape became the registered proprietor of the land on which the motel and associated development was constructed, as well as the water bore. The Garners allege that they had informed the real estate agents for Arcape that the sale did not include the water bore or the land on which it was situated. The council requested that Arcape transfer the land on which the bore was located — this was refused. In 1998, the council commenced an action seeking the sum of \$65,000 from the Garners as equitable compensation for breach of trust — it being alleged that the Garners held the land as bare trustee for the council. In January 2002, the council brought an application to have Arcape joined as a second defendant. Arcape submitted that it obtained an indefeasible title upon registration and that a registered proprietor is not affected by actual or constructive notice of an unregistered interest. By contrast, the council argued that this was an appropriate case for the in-personam exception to indefeasibility to apply. It was put forward that the council had a legal or equitable right of action against another (ie, the in-personam action) — and in this case, the equitable right of action against Arcape arose from the principles of *Barnes v Addy*.<sup>10</sup> In its application to the facts, it was submitted that Arcape had knowingly received and retained trust

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<sup>7</sup> [1998] 3 VR 133.

<sup>8</sup> These are largely paraphrased from the judgement of Atkinson J, above n 3 at paras 38–47.

<sup>9</sup> The council's interest in the water bore stemmed from the fact that it supplied the water for the township of Moonie.

<sup>10</sup> (1874) LR 9 Ch App 244.

property in a manner that was inconsistent with the rights of a beneficiary, and because of this, held that property on constructive trust for the council.

The 2:1 majority decision accepted the submission of council — Arcape could be joined as a defendant. Indefeasibility was no barrier to a successful *Barnes v Addy* claim.

### **The reasoning of the majority — Atkinson J (with whom McMurdo P largely agreed)**

His honour began by noting<sup>11</sup> that well-known phrase from *Breskvar v Wall*<sup>12</sup> that the Torrens system was a system of title by registration, not registration of title. Accordingly, indefeasibility was at the core of the Torrens system. However, this was not an absolute principle — if there was an equity that arose from the conduct of the registered proprietor, then that equity would be sufficient to override the conduct of Arcape. In other words, indefeasibility could be impeached by the conduct of the present registered proprietor.<sup>13</sup> In this case, the council argued that when they paid the Garners, (and the transfer, for whatever reason was not registered); the legal result was that the Garners became a bare trustee for the council. As Arcape was informed, through their real estate agent that the land belonged to the council, Arcape was in receipt of trust property. It was therefore bound to give effect to that trust, in accordance with the principles from *Barnes v Addy*. Quoting from this case,<sup>14</sup> Atkinson J stated:

[S]trangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a Court of Equity may disapprove, *unless those agents receive and become chargeable with some part of the trust property*, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees. (Emphasis added by Atkinson J).

His honour then went on to discuss the confusion that surrounds the degree of knowledge that must be had for this principle to be invoked. One line of cases suggesting that the recipient (ie, Arcape) must act with a ‘want of probity’, whereas other cases suggest that there is no element of dishonesty.<sup>15</sup> After a brief discussion of the Australia cases that have applied these principles,<sup>16</sup> his honour concluded that equity would hold liable a stranger who takes trust property with knowledge that it is trust property — no element of dishonesty was required.<sup>17</sup> The next aspect for consideration was the degree of

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<sup>11</sup> Above n 3 at para 49.

<sup>12</sup> (1971) 126 CLR 376 at 385–6.

<sup>13</sup> Above n 3 at para 52.

<sup>14</sup> Above n 3 at para 54.

<sup>15</sup> See above n 3 at para 59.

<sup>16</sup> Above n 3 at paras 60–3.

<sup>17</sup> Above n 3 at para 63. The explanation that dishonesty is not being an element rests on the explanation that the principle is restitutionary based aimed at avoiding unjust enrichment. Above n 3 at para 61 — quoting *Koorootang Nominees Ltd v ANZ Banking Group* [1998] 3 VR 16; *National Australia Bank Ltd v Rusu* [2001] NSWSC 32; S Gardner, ‘Knowing Assistance and Knowing Receipt: Taking Stock’ (1996) 112 *LQR* 56.



knowledge that was required. He began his analysis by outlining the five categories of knowledge that are summarised in *Baden Societe Generale*:<sup>18</sup>

- (i) actual knowledge;
- (ii) wilfully shutting one's eyes to the obvious;
- (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable person would make;
- (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable person;
- (v) knowledge of circumstances which would put an honest and reasonable person on inquiry.

The fifth category largely aligning itself with a negligence standard, whereas the first three categories all containing an element of subjective dishonesty, the fourth group capturing 'the defendant who is subjectively honest, or claims to be, but whose failure to recognise impropriety is egregious'.<sup>19</sup> Knowledge within these first four categories would suffice to establish liability under the *Barnes v Addy* principle. Importantly, even if Arcape could not be held liable under ordinary equitable principles, the Queensland legislation which provided an exception for indefeasibility for an 'equity arising from the act of the registered proprietor',<sup>20</sup> established a sufficient basis to hold that the act of registration effected with knowledge that the transfer is in breach of trust (within the first four categories outlined) gave rise to an exception to indefeasibility. Atkinson J considered that by fixing the standard of knowledge no lower than the fourth *Baden* category, the appropriate balance is achieved between trust principles and the operation of the Torrens legislation.<sup>21</sup>

The argument of Arcape was along strict real property guidelines.<sup>22</sup> Under the principles of Torrens, the interest of a registered proprietor cannot be defeated by notice of an existing interest — knowledge (whatever category you may refer to) is simply insufficient to unseat indefeasibility. Second, it was suggested that the arguments of council, if accepted, would undermine the certainty of the register and the Torrens system of title registration. These arguments were simply not accepted by his honour. The exception that he was creating was limited by the knowledge that the property was trust property and that its receipt was in breach of trust. Given these strictures, the appropriate balance in the circumstances of this case was to accord greater prominence to equity than to Torrens.

McMurdo P was largely in agreement with Atkinson J, noting that the council's claim was at least not so untenable that it could not succeed.<sup>23</sup>

### **The minority — Davies JA**

His honour considered that while the indefeasibility principle was subject to a claim in-personam, the recognition and enforcement of that equity could not conflict with the fundamental principle that a person taking a transfer of

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<sup>18</sup> [1992] 4 All ER 161.

<sup>19</sup> Above n 3 at para 65.

<sup>20</sup> The statutory equivalent of the in personam rule — s 185(1) Land Title Act 1994.

<sup>21</sup> Above n 3 at para 76.

<sup>22</sup> Above n 3 at paras 80–9.

<sup>23</sup> Above n 3 at para 6.

Torrens land would not be weakened by notice, actual or constructive of any interest.<sup>24</sup> He states<sup>25</sup> (a statement worth repeating in detail):

There is no authority, binding or persuasive, for the proposition that the interest of a purchaser of land who becomes registered as owner with knowledge that the transfer to it was in breach of trust by the vendor, let alone that of such a purchaser who becomes registered after the making of no more than an unsubstantiated assertion that an unregistered person is the owner of part of the land, is defeasible. Nor is there any basis in principle, for the purpose of the application of s 185(1)(a), for distinguishing an assertion of equitable ownership in an unregistered person from an assertion in such person of some lesser equitable interest. If it were otherwise, the fundamental proposition that the interest of a registered proprietary is not affected by his or her prior knowledge of unregistered interests would need to be modified to accommodate different results depending on the nature of the prior unregistered interest.

In essence, dishonesty was essential — mere knowledge of any trust or unregistered interest would not undermine indefeasibility, the underpinning of Torrens was to remain secure.

## Conclusion

The law on the knowing receipt principles of *Barnes v Addy* has grown into a 'fearful complexity', or as Megarry VC more mundanely described it, into something of a 'muddle'.<sup>26</sup> Normally, the same cannot be said of indefeasibility. The principle, simply stated, is easy to understand and stands as a bedrock of Torrens title — a registered proprietor is subject only to such estates and interests as are noted on the Register. Exceptions are narrow, well-confined and justified, these include the vulnerability of the registered proprietor as to their own fraudulent conduct (interpreted so as to require personal dishonesty)<sup>27</sup> and the in-personam exclusion (as interpreted by the High Court in *Bahr v Nicolay*). To further make indefeasibility subject to the nebulous grounds of *Barnes v Addy* is undesirable and unwarranted. The property landscape of Australia must have the fault line created by *Tara Shire Council v Garner, Arcape and Martin* fixed, otherwise the tectonic plate of equity will render the foundation of Torrens unstable and unclear. Exceptions must not only be articulated, they must be justified — the onus rests on those weakening indefeasibility to justify this intervention — *Tara Shire Council* failing to convincingly make this argument.

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<sup>24</sup> In this context his honour quoted from *Bahr v Nicolay [No 2]* (1988) 164 CLR 604.

<sup>25</sup> Above n 3 at para 33.

<sup>26</sup> C E P Haynes, 'The Stranger as Constructive Trustee — Recent Developments in Knowing Assistance and Knowing Receipt Liability', in W D Duncan (Ed), *Commercial and Property Law*, Federation Press, Queensland, 1991, p 72 at 73 (citations deleted).

<sup>27</sup> See generally: *Yew v Port Sweetenham Rubber Co* [1913] AC 491; *Bahr v Nicolay (No 2)* (1988) 62 ALJR 268; 78 ALR 1; 164 CLR 604; *Russo v Bendigo Bank and Reichman* [1999] VSCA 108; *Bank of South Australia v Ferguson* (1998) 192 CLR 248.



## Indefeasibility and mistake — the utilitarianism of Torrens

Lynden Griggs\*

*In **Lukacs v Wood** ((1978) 19 SASR 520) and **Tutt v Doyle** ((1997) 42 NSWLR 10) it was accepted that rectification could form the basis of a personal equity sufficient to establish an in personam claim. However, there are a number of cases (**Medical Benefits Fund of Australia Ltd v Fisher** [1984] 1 Qd R 606; **State Bank of New South Wales v Berowra Waters Holdings Pty Ltd** [1986] 4 NSWLR 398 and **Tanzone Pty Ltd v Westpac Banking Corp** (1999) 9 BPR 17,287; NSW ConvR 55-908) where the plaintiffs were no less deserving of protection, but indefeasibility prevailed over any possible equity. This article examines these cases and finds that there is no convincing reason for the differences. What this reiterates is that while the Torrens system of land registration will operate for the benefit of most, in some instances innocent people will suffer. This reinforcing the utilitarian focus of title by registration.*

### Introduction

All property law scholars recognise that indefeasibility is at the core of the Torrens system. Indefeasibility of title is a recognition of the fundamental concept that title is neither historical nor derivative, and that the interest of the registered proprietor is paramount.<sup>1</sup> Well-understood, well-recognised, any challenge to it must be treated with scepticism and caution. As noted by Owen J in *Conlan v Registrar of Titles*:<sup>2</sup> '[I]t must be given the utmost respect and should be applied according to its tenor.' The attainment of indefeasibility to be achieved by applying the twin pillars of the 'curtain' and the 'mirror'.

The curtain principle provides that the Register is the sole source of information; claims to equitable interests which lie beyond the curtain are of no concern. The mirror principle provides that the Register reflects accurately and completely the status of the title.<sup>3</sup>

However, just how indefeasible is this indefeasible title? Never recognised as an absolute concept,<sup>4</sup> fraud has been, and still is, the principal exception to the paramountcy of indefeasibility — the narrow and limited interpretation of this reinforcing, rather than derogating from the status of indefeasibility. Not all species of fraud would attract intervention — it would only be in the most egregious examples of personal dishonesty where the courts would intervene.<sup>5</sup>

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1 As noted in *Conlan v Registrar of Titles* [2001] WASC 201 at [159]; BC200104400, quoting from the High Court decision in *Breskvar v Wall* (1971) 126 CLR 376 at 386; [1972] ALR 205.

2 [2001] WASC 201 at [196]; BC200104400.

3 R Atherton, 'Donees, Devisees and Torrens Title: The Problem of the Volunteer under the Real Property Acts', (1998) 4 *Aust J Leg Hist* 121 at 123.

4 As noted by Atherton, above n 3 at 125.

5 Standard examples that indicate this include *Wicks v Bennett* (1921) 30 CLR 80; 28 ALR 30;

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Other statutory exceptions that have subsequently been developed, are largely of limited application.<sup>6</sup> Notwithstanding the primacy of fraud as the principal exception, it is in personam that has the potential to significantly and severely restrict the operation of indefeasibility. The application of this potentially undermining the theoretical basis of Torrens — that each new registered proprietor hold directly from the Crown — ‘through a process of surrender of title and a new grant from the Crown, thereby achieving the independence of title that Torrens saw as the key to his reform’.<sup>7</sup> In personam rendering the registered proprietor liable to the personal equities held by another, these personal equities hiding behind the curtain and not reflected in the mirror. The purpose of this paper is not to examine the full parameters of this exception, for which much has been written,<sup>8</sup> but to isolate and address one specific aspect — that being the position of the registered proprietor where land has been mistakenly transferred to them. Is this person entitled to claim an indefeasible title, or does the mistake in the conveyancing process render them liable to the equity of rectification? An old example of this scenario illustrated by the New Zealand Supreme Court decision of *Jonas v Jonas*.<sup>9</sup> In this case, A agreed to sell to B and C separate parcels of land. By an innocent mistake, B received what C should have done, whereas C received what B should have obtained. B brought an action to require C to execute the relevant transfers to rectify the mistake. The court held that as C had not been fraudulent in the acquisition of its interest, and that the retention of possession was not fraudulent, the equitable jurisdiction of the court could not be invoked to seek relief. Would the same result follow today? Do we allow the windfall benefit to be retained, in the interests of preserving the integrity of the Torrens system, or can we somehow limit any exception to definable rules so that integrity is maintained, while at the same time achieving a result that would seem to be fair and just. As recently stated in the context of an investment scheme which went awry:<sup>10</sup>

In my view there is some (admittedly limited) scope within the recognised exceptions [to indefeasibility] to import notions of fairness. But as the fact situation of the case demonstrates, *totally innocent people are going to be hurt* by the resolution of the legal issues and their application to the disaster that others have foisted on them. There is no way that the questions raised by this case can be answered without some of the investors, *through no fault of their own*, being unable to recover all or some of the money they have invested. Accordingly, to use general notions of fairness as a means of implying further exceptions into the statutory scheme is apt to raise as many questions as it will answer. (emphasis supplied)

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*Assets Co v Mere Roihi* [1905] AC 176; *Macquarie Bank v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133; [1997] V Conv R 54–572; see also E Toomey, ‘Certainty of Title in the Torrens System: Shifting Sands’, (2000) 4 *FJLR* 235 at 236–9.

6 These exceptions providing for situations of competition certificates of title; where there is a misdescription in the land; where there are omitted easements; protection for short tenancies; adverse possession and liability for rates and taxes: see A Bradbrook, S MacCallum and A Moore, *Australian Real Property Law*, LawBook Co, Sydney, 2002, at 131–46 for a discussion of these exceptions.

7 R Atherton, above n 3 at 123.

8 See the list of articles cited at Bradbrook, MacCallum and Moore, above n 6 at 150, fn 287.

9 (1883) LR 2 SC 15 (NZ).

10 *Conlan v Registrar of Titles* (2001) WASC 201 at [194]; BC200104400 per Owen J.

### Indefeasibility and mistake — the utilitarianism of Torrens 3

This paper addresses this issue — how, in the context of mistake, do we minimise the number of innocent people deleteriously affected by the operation of Torrens. The balance to be sought articulated by Winneke P:<sup>11</sup>

It is, I concede, logically attractive to argue that legitimate equitable claims should not be emasculated by setting the threshold level of conduct . . . too high; on the other hand it is, in my view, an argument of equally compelling force that the threshold should not be set so low as to defeat the concept of indefeasibility which is entrenched in and central to the Torrens system of registration of interests in land . . .

### What are the requirements of an in personam claim?

The oft-quoted starting point is the decision of the Privy Council, on appeal from New Zealand, of *Frazer v Walker*.<sup>12</sup> The principle of indefeasibility in no way ‘denies the right of the plaintiff to bring against a registered proprietor a claim in personam, founded in law or equity, for such relief as a court acting in personam may grant’.<sup>13</sup> However, what is less known is that the statement of the Judicial Committee in this case only confirmed and reiterated what had previously been accepted.<sup>14</sup> It is a principle recognised by Australia’s highest court in *Barry v Heider*,<sup>15</sup> indefeasibility not destroying the ‘fundamental doctrines by which courts of equity have enforced, as against registered proprietors, conscientious obligations entered into by them’.<sup>16</sup>

Despite the obviously flexible nature of the in personam interest, the cases have established the following guidelines:

- A legal or equitable interest must exist, which would ordinarily be enforceable against the registered proprietor;<sup>17</sup>
- The conduct leading to the in personam claim can arise before, or after registration;<sup>18</sup>
- In personam cannot be used to undermine the fundamental precepts of the Torrens system.<sup>19</sup>

Furthermore, as pointed out by Anderson and Steytler JJ in *LHK Nominees Pty Ltd v Kenworthy (as administrator of the Estate of Lionel Kenworthy)*<sup>20</sup> in personam does not supply a blank canvas on which a plaintiff can establish

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11 *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133 at 136; [1997] V Conv R 54–572.

12 [1967] 1 AC 569; 2 WLR 411; 1 All ER 649.

13 [1967] 1 AC 569 at 585; 2 WLR 411; 1 All ER 649.

14 For example, *Maddison v McCarthy* (1865) 2 WW & a’B (Eq) 151; *Cuthbertson v Swan* (1877) 11 SALR 102; *Sempill v Jarvis* (1867) 6 SCR (NSW) Eq 68.

15 (1914) 19 CLR 197; 21 ALR 93.

16 (1914) 19 CLR 197 at 213; 21 ALR 93 per Isaacs J.

17 *Grgic v Australian & New Zealand Banking Group Ltd* (1994) 33 NSWLR 202; *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133; [1997] V Conv R 54–572; *Pyramid Building Society (in liq) v Scorpion Hotels Pty Ltd* [1998] 1 VR 188.

18 *Bahr v Nicolay (No 2)* (1988) 164 CLR 604; 78 ALR 1; 62 ALJR 268; *Bank of South Australia Ltd v Ferguson* (1998) 192 CLR 248; 151 ALR 729; 72 ALJR 551.

19 *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at 613 (per Mason CJ and Dawson J) at 637–8 (per Wilson and Toohey JJ) at 652–3 (per Brennan J); 78 ALR 1; 62 ALJR 268.

20 [2002] WASCA 291; BC200206314.

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any claim.<sup>21</sup> 'In short, unconscionability is a necessary, but not sufficient, criterion.'<sup>22</sup> Accordingly, what is required to establish an in personam claim based on an equity for rectification — the rectification arising from mistake. The following cases indicating a range of responses.

***Lukacs v Wood***<sup>23</sup>

In this case, the plaintiff had been the registered proprietor of four adjoining lots. Three of the lots were vacant, residential flats occupied the fourth. The intent of the plaintiff was to transfer the three vacant parcels of land to the defendant. However, due to a misdescription in the contract the defendant was the recipient of two vacant blocks, plus the land occupied by the residential dwellings. This mistake was perpetuated in the conveyancing process and was not discovered until some 2 years after the transaction. The plaintiff was prepared to transfer the vacant lot to the defendant in exchange for a reconveyance of the land on which the units were built. The defendant's response was blunt — indefeasibility of title permitted him to retain the land on which the flats were erected.<sup>24</sup>

[The defendant] says nevertheless that his title as registered proprietor is absolute and indefeasible; that a Court of Equity has no power to order rescission of the contract after conveyance; and neither has it the power to order rectification and restitutio ad integrum in the absence of fraud (which is not alleged) or a total failure of consideration . . . [t]he fact that by any ordinary notions of justice it is wholly inequitable to allow the defendant in consequence of a mutual mistake, to retain the benefit of a bargain which he did not make, and for which he has paid but a fraction of its true worth, is said to be immaterial.<sup>25</sup>

The plaintiff's rejoinder to this was that it would be unconscionable for the defendant to retain the title to that land, what had occurred amounted to a total failure of consideration, and that the court had the power to intervene.<sup>26</sup>

The Supreme Court of South Australia found in favour of the plaintiff. Quoting from the High Court in *Svanosio v McNamara*<sup>27</sup> a substantial error occurred in the contracting process, there was in practical terms a total failure of consideration, and the effect of this common mistake was to make the contract void, or at least voidable.<sup>28</sup> The court ordering that the plaintiff transfer to the defendant the vacant block in exchange for a retransfer of the parcel of land on which the residential dwellings were built.

While this decision represents what most would see as an equitable and fair solution, to rely on the lack of consideration as a basis for determination is, with respect, misguided. The contract referred to volume and folio number of the parcel of land containing the residential flats — the purchaser received precisely what the contract stated.

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<sup>21</sup> [2002] WASCA 291; BC200206314 at [216].

<sup>22</sup> J P Moore, 'Equity, Restitution and in personam claims under the Torrens system', (1998) 72 *ALJ* 258 at 260.

<sup>23</sup> (1978) 19 SASR 520.

<sup>24</sup> (1978) 19 SASR 520 at 521–2.

<sup>25</sup> (1978) 19 SASR 520 at 525, 529.

<sup>26</sup> (1978) 19 SASR 520 at 522.

<sup>27</sup> (1956) 96 CLR 186; [1956] ALR 961.

<sup>28</sup> (1978) 19 SASR 520 at 529.



### ***Tutt v Doyle***<sup>29</sup>

The respondents were selling land to the appellant. There was a mistake, not in the contract, but in the effect of the transfer that saw Tutt receive a block of land larger than what was intended. Tutt was aware that a mistake had been made. The New South Wales Court of Appeal saw the issue in simple terms: 'is it unconscionable for one party knowingly to take advantage of another party's mistake?'<sup>30</sup> In answering this question in the affirmative, the court applied the reasoning of the High Court in *Taylor v Johnson*<sup>31</sup> that equity can grant relief where there has been a mistake, where the court is of the opinion that it would be unconscientious for the party to take advantage of that situation.<sup>32</sup> Tutt, in seeking to rely on indefeasibility was acting unconscionably.

Chambers<sup>33</sup> considers that this case is an example of restitutionary-based relief. The constructive notice of the plaintiff's interest was sufficient to establish the restitutionary interest, which Doyle could enforce against Tutt. He saw no conflict between the goals of Torrens and the desire to achieve justice.

The principles governing claims for restitution of unjust enrichment, modified to accommodate the Torrens system, can provide the needed balance between the plaintiff's restitution interest and the defendant's security interest. A defendant who acquires a registered interest in Torrens land from a plaintiff, with notice of the facts giving rise to the plaintiff's claim for restitution of that interest (that is notice that the interest is an unjust enrichment at the plaintiff's expense), should not be protected from that claim by the principle of indefeasibility.<sup>34</sup>

In slightly different language, Seddon and Ellinghaus<sup>35</sup> summarise how unconscionability forms the basis of mistake:

In unilateral mistake cases [*Tutt v Doyle*] the element of unconscionability is provided by one party knowing that the other is mistaken. In common mistake cases [*Lukacs v Wood*], it is suggested that the element of unconscionability is provided by one party taking advantage of a mistake when it is clear that the fair and just solution is to undo the transaction.<sup>36</sup>

Whatever the language, the basis is clear. Indefeasibility cannot be asserted as an overarching criterion where it would be unconscionable, or perhaps in a different idiom — where the registered proprietor would be unjustly enriched, to rely on her or his security of title. The difficulty with the bland acceptance of this noted by Hepburn: 'The ambiguous and pejorative nature of equity does not fit easily into a statutory structure centred around the guarantee of land title upon registration. Indefeasibility of title upon

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29 (1997) 42 NSWLR 10.

30 (1997) 42 NSWLR 10 at 12.

31 (1983) 151 CLR 422; 45 ALR 265.

32 (1997) 42 NSWLR 10 at 14.

33 R Chambers, 'Indefeasible Title as a Bar to a Claim for Restitution', [1998] *Restitution Law Review* 126.

34 Chambers, above n 33 at 134.

35 N C Seddon and M P Ellinghaus, *Cheshire and Fifoot's Law of Contract*, 8th ed, Butterworths, Sydney, 2002.

36 Seddon and Ellinghaus, above n 35 at 614.

registration necessitates a level of certainty and determination which is, in many ways, directly oppositional to the approach taken by the equitable principles of fairness.<sup>37</sup> In addition to this principled resistance to unconscionability forming the basis of an in personam exception, the following three cases demonstrate the application of a different approach, and a result diametrically opposed to that which occurred in *Lukacs v Wood* and *Tutt v Doyle*. They also point out the artificiality of relying on the contractual doctrine of mistake as the foundation for the establishing of an in personam claim. The following plaintiffs in no way any less deserving of the court's remedial protection than Messrs Lukacs and Doyle, the defendants receiving an 'unjustified windfall benefit'?<sup>38</sup>

### ***Medical Benefits Fund of Australia Ltd v Fisher***<sup>39</sup>

Fisher purchased land that had previously been held by three proprietors as tenants in common. Each tenant in common held an original certificate of title. When Fisher purchased the land, the Deputy Registrar of Titles issued one new certificate, in place of the three previous certificates. In the course of this changeover, a clerical error saw the new certificate of title failing to mention the lease agreement made with the plaintiffs. The lease agreement was for an initial term of 3 years, with an option to renew for three consecutive terms of 3 years each. Medical Benefits Fund had exercised one option, but when it sought to exercise the second option, Fisher sought to rely on indefeasibility of title to argue that she was not bound by the agreement between the previous registered proprietors and the plaintiff. There was uncontradicted evidence that Fisher knew of the lease agreement.<sup>40</sup>

In holding in favour of Fisher, the Queensland Court considered that there was no personal equity that could be raised against her. She had not been guilty of fraud, and true to the Torrens system, mere notice of an unregistered interest was not to be imputed as fraud.<sup>41</sup> Accordingly, despite the simple error which had seen the lease removed from the title, and the knowledge by Mrs Fisher of this lease agreement, no personal equity could be raised — the distinguishing feature between this case, and *Lukacs v Wood* and *Tutt v Doyle*, is that the Fisher and the Medical Benefits Fund of Australia had never been in any contractual relationship. Accordingly, no equity of rectification based on contractual mistake could be raised.

### ***State Bank of New South Wales v Berowra Waters Holdings Pty Ltd***<sup>42</sup>

In this case, the decision in *MBF v Fisher* was extended. The facts were that the mortgagee had mistakenly discharged a mortgage from a property. In

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37 S Hepburn, 'Concepts of Equity and Indefeasibility in the Torrens Systems of Land Registration', (1995) 3 *APLJ* 41.

38 J Tooher and B Dwyer, *Introduction to Property Law*, 4th ed, LexisNexis Butterworths, Sydney, 2002, at 80.

39 [1984] 1 Qd R 606.

40 [1984] 1 Qd R 606 at 610.

41 [1984] 1 Qd R 606 at 610.

42 [1986] 4 NSWLR 398.



seeking to have it reinstated, they argued that there existed a personal equity arising against the mortgagor that the mortgage should not be discharged unless the debt had been paid.<sup>43</sup> This was doubted by Needham J, with his honour simply concluding that: ‘But [even] assuming the existence of a personal equity against the second defendant arising out of the mortgage and its discharge, the reasons given in *Frazer v Walker* show that no action on a personal equity . . . may be maintained.’<sup>44</sup> Thus, even though there was a mistake made, and in this case, the parties were in a contractual relationship, no remedy was available — indefeasibility prevailed. It is submitted that this decision would be strongly reargued if the same facts presented themselves again.

### ***Tanzone Pty Ltd v Westpac Banking Corp*<sup>45</sup>**

A similar result, though the parties were not in a contractual relationship, was also reached in *Tanzone Pty Ltd v Westpac Banking Corp*. The original agreement between the lessor and lessee contained a rent review clause — which neither party appreciated would result in the amount of the rent escalating greatly over the term of the lease. The agreement did not reflect the true intent of the parties and rectification would normally have been available. However, the lessor had sold to a purchaser who had obtained title by registration. The purchaser was fully aware that the agreement between the original lessor and lessee did not reflect the true intent of the parties. Despite this, registration granted the purchaser indefeasibility and thus the equity of rectification was extinguished.<sup>46</sup> As was noted by the Windeyer J: ‘. . . while notice [of the equity of rectification] itself cannot lead to a right in personam, notice together with an agreement to be bound by the interest can amount to unconscionable conduct justifying relief.’<sup>47</sup> Notwithstanding this, on the facts of this case, unconscionability was not established.

### **Reflection on the cases**

In summary, apart from the contractual basis of in personam, the cases give no clear indication as to why the plaintiffs in *Lukacs v Wood* and *Tutt v Doyle* were able to succeed, yet their equivalent in *Medical Benefits Fund v Fisher*; *State Bank of New South Wales v Berowra Waters* and *Tanzone Pty Ltd v Westpac Banking Corp* were not. The essential facts of each case were no different — the operation of indefeasibility has seen one individual lose an interest in the land as a result of a mistake. In one series of cases, the plaintiffs have been able to invoke their personal equity. By contrast, with the latter

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43 [1986] 4 NSWLR 398 at 403.

44 [1986] 4 NSWLR 398 at 403.

45 (1999) 9 BPR 17,287; NSW ConvR 55-908.

46 See the brief note on this case: P Butt, ‘Rectification thwarted by indefeasibility’, (2000) 74 ALJ 280 where he notes that the different wording of the Victorian legislation may have led to a different result: Section 42 of the Transfer of Land Act 1958 excluding from the doctrine of indefeasibility, the “interest of a tenant in possession of the land.”

47 (1999) 9 BPR 17,287; NSW ConvR 55-908 at [52]. The case was appealed to the New South Wales Court of Appeal where the court adopted a different method of analysis — in that forum the dispute centred on the interpretation of the contract, rather than a case of rectification: *Westpac Banking Corp v Tanzone* (2000) 9 BPR 17,521.

three cases, no remedy was available. To have a distinction simply on the relationship between the parties ignores an appreciation of the need to articulate how the in personam interest can form a coherent and discrete exception to the paramountcy of indefeasibility.

From this case law confusion and academic debate, can any solution be found which will provide a theoretical underpinning to the principles of Torrens, but at the same time achieve the necessary balance between the big picture of indefeasibility and the justice of an appropriate result when two parties are in direct dispute. Unconscionability of itself cannot provide the answer. As noted by *Birks*<sup>48</sup> in the context of a discussion of *Garcia v National Australia Bank*<sup>49</sup> ‘... unconscientiousness [in the retention of a benefit] ex post is itself fictitious ... It does not tell us in honest and straightforward way why we are sure that that the [recipient] ought to give up its [benefit].’<sup>50</sup> What we must attempt to do is to provide a solution that reinforces the foundations of Torrens, while providing the requisite flexibility to control a set of transactions where a common or unilateral mistake has led to what may be perceived as an unjustified advantage. ‘Can a rule of law which assists the [former registered proprietor] be sufficiently contained and limited so as to remove any risk that lawyers and even courts are tempted into the “enchanted forest”?’<sup>51</sup> Or are we to simply accept that the objectives of a system of title by registration will result in a set of isolated cases where people will be sacrificed to the utilitarian focus of that system.

### The available solutions

Any mooted solution has to balance two matters; first, the paramountcy of indefeasibility with second, the need to achieve a fair and equitable result. Three possibilities come to mind, the first of which represents either a radical, or discrete (depending on one’s perspective) of the in personam exception, the other two outside of that arena:

- (1) Restitutionary based relief;
- (2) Deferred indefeasibility in situations of mistake;
- (3) Statutory personal liability imposed on the windfall recipient.

### Restitutionary-based relief

Chambers argues forcefully that:

The application of common law principles to a Torrens system requires some adjustment. The registration of title in the name of the defendant, without the consent of the plaintiff, creates a valid legal title, even though a purported conveyance on that basis would be void at common law. This means that many situations, which could be dealt with at common law through the passive preservation of the plaintiff’s pre-existing interest, will have to be handled in a

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48 P Birks, ‘The Law of Restitution at the end of an Epoch’, (1999) 28 *University of Western Australia Law Review* 13.

49 (1998) 194 CLR 395; 155 ALR 614; 72 ALJR 1243.

50 Birks, above n 48 at 27.

51 To borrow a phrase from R J Sutton, ‘What Should be Done for Mistaken Improvers’, in P D Finn (ed) *Essays on Equity*, Law Book Co, Sydney, 1990, 241 at 245.

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Torrens system as restitution of unjust enrichment . . . The right to recover [the] property arises on (or after) the transfer because the defendant has received an enrichment at the expense of the plaintiff which the law considers unjust and reversible.<sup>52</sup>

Specifically, in this instance, he submits that restitution based on a vitiation of the plaintiff's intent to benefit the defendant (that is a mistake) does not require any wrongful conduct by the defendant.<sup>53</sup> In his opinion, that view of the in personam exception is altogether too narrow, and ignores those rights which can result from no action of the registered proprietor — noting the examples of the creation of an express trust by the transfer of property in trust, or the creation of the resulting trust through the purchase of property in the name of another.<sup>54</sup> Taking an expansionary view of restitution in its application to immediate indefeasibility, he considers that excluding unjust enrichment claims from in personam will place intolerable pressure to extend the fraud exception to indefeasibility, or alternately, necessitating the characterisation of the conduct by the defendant in the mistake as dishonest — this distorting the underlying principles of unjust enrichment.<sup>55</sup> 'If the defendant knew or ought to have known that the plaintiff was operating under mistake, duress, undue influence, or in ignorance of the transaction itself, the plaintiff's interest in obtaining restitution of the unjust enrichment can prevail over the defendant's interest in the security of his or her receipt, without undermining the objectives of the Torrens system.'<sup>56</sup>

The view of Chambers is persuasively made, but it is contrary to established authority,<sup>57</sup> as well as the well-recognised limitation that in personam claims should be limited to conduct from the registered proprietor. Hughson, Neave and O'Connor<sup>58</sup> submit:

In personam relied under the Torrens system should be confined to actions arising from transactions entered into by the registered proprietor . . . and obligations imposed upon him or her by reason of personal conduct . . . To confine the exception in this way serves to reassure all purchasers that their title will not be defeasible unless they act in breach of a personal obligation. At the same time it allows for equitable intervention to prevent registered proprietors making unconscientious use of title to escape their legitimate obligations.<sup>59</sup>

It is respectfully submitted that this latter view is correct. Restitutionary

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52 Chambers, above n 33 at 128–9.

53 Chambers, above n 33 at 129.

54 Chambers, above n 33 at 131.

55 Chambers, above n 33 at 133. It can also be noted that applying dishonesty to the concept of indefeasibility is arguably equally inappropriate. As noted by Brooking JA in *Russo v Bendigo Bank and Reichman* [1999] 3 VR 376 at [41]: 'One should be careful about applying rules as to dishonesty laid down for the purpose of the rules of equity, for one may remember that one of the principal reasons Sir Robert Torrens had for introducing the concept of indefeasibility of title was to overcome the sophisticated use of equitable principles to hold up and defeat claims to title.'

56 Chambers, above n 33 at 134.

57 Such as *Grgic v ANZ Banking Group Ltd* (1994) 33 NSWLR 202 at 222–3; *Pyramid Building Society v Scorpion Hotels Ltd* [1998] 1 VR 188.

58 M Hughson, M Neave and P O'Connor, 'Reflections on the Mirror of Title: Resolving the Conflict Between Purchasers and Prior Interest Holders', (1997) 21 *Melb U L Rev* 460.

59 Hughson, Neave and O'Connor, above n 58 at 492.

principles of unjust enrichment need to give way, (when in conflict) to the principle of immediate indefeasibility and the limited application of in personam. 'Broad spectrum'<sup>60</sup> claims that arise from the invalidity of the transaction, not from the conduct of the registered proprietor, should not form part of the in personam exception. Interpreting in personam in this way is not to impose an artificial, legalistic and technical barrier, rather it is to confine in personam within narrow parameters and serves to reinforce the theory of indefeasibility — that each dealing in land involves a surrender back to, and then a reissue from the Crown. This rendering otiose any need to look behind the curtain. The fictitious nature of unconscionability<sup>61</sup> in retention of the legal interest can at best only serve as the basis for policy motivated restitution, and in this instance, the policies and principles of Torrens need to prevail — otherwise the 'justifiable aim of controlling a species of transaction is achieved by damaging and diluting established doctrine.'<sup>62</sup>

### Deferred indefeasibility

All readers would be aware that recognised theory of indefeasibility accepted in Australia and New Zealand is that of immediate indefeasibility.<sup>63</sup> The fact that the indefeasibility is obtained through the registration of a void or voidable instrument is irrelevant. By contrast, under the deferred theory of indefeasibility, indefeasibility is postponed to one further transaction. For example, if A transfers to B under a void dealing, and B registers, immediate indefeasibility provides B with a valid title, whereas under deferred indefeasibility, a valid title would only exist once B transfers to C. In the instant matter under consideration, deferred indefeasibility would have the advantage of deferring good title to a transferee from the beneficiary of the mistake. Immediate indefeasibility would be one removed from the problem dealing. The disadvantage with adopting this is that once introduced, arguments will no doubt be made that it should be extended to additional scenarios. While it may cliché to say it, to allow deferred indefeasibility to operate in one limited circumstance would allow its operation to undermine the foundation and bedrock of Torrens — that of immediate indefeasibility.

### Statutory personal liability imposed on the windfall recipient

A third solution to the dilemma presented is derived from the genesis of Torrens. This is to create a statutory based personal liability on the registered proprietor when they have been the recipient of a windfall benefit from the operation of indefeasibility. This would give the registered proprietor the option of agreeing to a correction of the register to reflect what should be the true state of affairs, or alternatively to compensate the person who has been deprived through operation of indefeasibility. It would balance the economic

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60 To borrow the language of Hughson, Neave and O'Connor, above n 58 at 491.

61 As described by Birks, above n 48 at 28.

62 Birks and Swadling, 'Restitution', [1997] *All ER Rev* 385 at 394.

63 *Frazer v Walker* [1967] 1 AC 569; 2 WLR 411; 1 All ER 649; *Breskvar v Wall* (1971) 126 CLR 376; [1972] ALR 205.

imperatives of the Torrens system which sees land as any other form of property — this dictating that efficiency and reduced transaction costs must be given due weight; against the fairness of ensuring that an individual does not unreasonably benefit from the operation of the system. It would allow the larger picture of Torrens to be balanced against the smaller, but nonetheless important exigency that the law, if it is to remain credible, must seek to achieve results, which the public would legitimately expect. Atherton, in her examination of the position of volunteers<sup>64</sup> noted that the original Torrens statutes had a provision which provided that volunteer would obtain an indefeasible title — but that he or she may still be liable for a damages claim.

Under these provisions indefeasibility of title needed to be distinguished from questions of personal liability. The nature of the personal liability was left rather vague. It was described in s 120 of the 1860 Act as a right to prosecute an ‘action-at-law’ for ‘damages’. Torrens was not a lawyer and his thinking, so far as it was expressed, appeared to be in a language which sought to get away from anything to do with Chancery courts and principles of equity. *He differentiated questions relating to the title from questions of compensation. This was expressed in his terms as ‘damages’ — a personal compensation to substitute for the loss of title to the land to which the person may otherwise be entitled. But it is not damages in the sense of common law damages, but more akin to equitable compensation.*<sup>65</sup> (emphasis included)

In applying this to the instant matter, while the registered proprietor may be entitled to security and convenience of an indefeasible title, they would still be liable to compensate for their windfall benefit to the person deprived, it being inequitable for the assurance fund and thus the state to be liable, when the registered proprietor has obtained something to which, arguably, they do not deserve. Paramountcy would still be given to indefeasibility, thus recognising the need for immediate indefeasibility to be applied strictly according to its meaning; the sole question would simply be one of compensation, and in particular, whom should pay. Equitable compensation<sup>66</sup> serving not as a cause of action, but as a remedial checkpoint so that appropriate restoration can be made. In essence, the statute would operate as the basis for intervention, equitable compensation the parameters of the award; indefeasibility separated from the issue of compensation. By this separation, the true nature of Torrens can be protected, while still allowing the courts to deliberate on how a fair result between two warring parties can be achieved. For example in *State Bank of New South Wales v Berowra Waters Holdings Pty Ltd*, it would allow indefeasibility to remain — the mortgage could not be reinstated to the register, but it would require that restoration be given to the party who has had their interest diminished from the person who has been enriched. Similarly in *MBF v Fisher*, the economic benefit given to Fisher by the removal of the interest of MBF would be restored to the plaintiff. Moreover, in *Tanzone Pty Ltd v Westpac Banking Corp*, the new purchaser would be liable to compensate the lessee for the unjustifiable benefit that they have received.

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<sup>64</sup> R Atherton, above n 3.

<sup>65</sup> R Atherton, above n 3 at 146.

<sup>66</sup> This able to reflect aspects such as conscience, fairness, hardship and other equitable features: *Day v Mead* [1987] 2 NZLR 443 at 462.

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Finally, in *Lukacs v Wood* and *Tutt v Doyle*, immediate indefeasibility would still prevail, but the successful defendants would have to make appropriate restoration for the benefit they have received.

### Conclusion

Certainty of title, the mirror and the curtain all stand at the forefront of the Torrens system of land registration. It is a system that has stood the test of time, adapted to the contemporary economic climate of certainty and commercial convenience, and has provided in the vast majority of transactions a simpler and cheaper method of land transacting. However, in the examples highlighted the registered proprietor was able to enjoy a windfall benefit because of a mistake — such mistake having to be subjugated to the principles of indefeasibility. As noted by Tooher and Dwyer:<sup>67</sup>

[T]he rules concerning mistake need to be clarified to ensure that a person deprived of an interest in land through a mistake of the Registrar does enjoy rights in personam against a registered proprietor who has not given consideration for the benefit derived from the mistake.

This raised the definitive policy question is to what extent indefeasibility should be ameliorated to achieve a more just and fair result. It is submitted that indefeasibility stands as the defining mark of the Torrens system, and its application at the zenith, immediate indefeasibility, is too fundamental a tenet to be weakened by allowing extensions to the in personam doctrine. Nevertheless, clear guidelines need to be drawn so that in cases of genuine mistake, some fair and equitable remedy is imposed. In personam arguably cannot supply this — its ambit is defined by the conduct of the registered proprietor; (and in many of these instances, the conduct of the registered proprietor has not been egregious, simply lucky), and for this reason restitutionary relief based on a concept of unjust enrichment would embody Torrens with a termite like cancer to its woodwork. Further, to open the avenue to deferred indefeasibility would simply be to present an option that would indubitably be explored and articulated beyond its set confines — the Pandora's box of land registration left ajar. Indefeasibility should not be diminished or weakened; rather solutions, which lie outside of this system, must be examined. One such potential solution is to provide a statutory based action, allowing for the remedy of a equitable compensation, (after all, the desire for a solution comes from an instinctive belief that something is untoward in the result). However, the solution has no contemporary presence and no apparent modern equivalent. The result is simply that while the principles of Torrens serves the needs of society, at the end of the day, innocent individuals will suffer.<sup>68</sup> Not appreciated by those affected, the only solace is that their sufferance serves the utilitarian focus of the Torrens system.

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<sup>67</sup> Tooher and Dwyer, above n 38 at 96.

<sup>68</sup> It was a deliberate decision not to extend the coverage of the paper into the application of the assurance fund to people injuriously affected. To do so would obfuscate the fundamental issue that some individuals are obtaining a windfall benefit at the expense of another. Furthermore, to simply suggest that the assurance fund, and thus the State, should compensate when another has benefited appears inherently unfair. Finally, as many readers would know, the assurance fund, in many jurisdictions, is difficult to access.



## Case Notes

### *Hillpalm Pty Ltd v Heaven's Door Pty Ltd*

Lynden Griggs\*

*Real Property cases rarely make it to the High Court. If for no other reason, the decision of **Hillpalm Pty Ltd v Heaven's Door Pty Ltd** [2004] HCA 59 demands close attention. At its heart, the case concerned the interaction of Torrens legislation, with the Environmental Planning and Assessment Act 1979 (NSW). In this case, the certificate of title to the servient and dominant tenements made no mention of a 'proposed right of way'. However, was the servient tenement bound to give effect to this interest, as it knew about it, and was mentioned on the deposited plans relevant to the sub-division? In holding that the servient tenement was not bound, the High Court (by a 3:2 majority) has reversed the decisions of the Land and Environment Court and the unanimous holding of the New South Wales Court of Appeal.*

***Hillpalm Pty Ltd v Heaven's Door Pty Ltd* [2004] HCA 59; BC200408154**

### Introduction

As every practitioner, student, and academic of Real Property Law knows, the title to land provided by the Torrens system is neither historical nor derivative — it is a system of title by registration. This point, paraphrased from the seminal decision of *Breskvar v Wall*,<sup>1</sup> was recently repeated in the High Court decision of *Hillpalm Pty Ltd v Heaven's Door Pty Ltd*.<sup>2</sup> Accordingly, if nothing else was added to the broad reach of this statement, the conclusion would follow that if no interest is noted on the title of the registered proprietor, then that person would not be bound by any extraneous interest. This is the very essence of indefeasibility.<sup>3</sup> It is reinforced by the notion that a person is not affected by notice of an unregistered interest.<sup>4</sup> Of course, the desire and the need of the law to do justice between individual parties necessitates that there must be some give or qualification to such a broad principle, and many

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1 (1971) 126 CLR 376 at 385. 'The Torrens system of registered title . . . is not a system of registration of title but a system of title by registration. That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor. Quoted in *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* [2004] HCA 59 at [52].

2 *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* [2004] HCA 59.

3 Reinforced in the legislation of all jurisdictions. Real Property Act 1900 (NSW) s 42; Transfer of Land Act 1958 (Vic) s 42; Land Title Act 1994 (Qld) s 38; Real Property Act 1886 (SA) ss 69–70; Transfer of Land Act 1893 (WA) s 68; Land Titles Act 1980 (Tas) s 40; Land Titles Act 1925 (ACT) s 58(1); Land Title Act (NT) s 39.

4 Real Property Act 1900 (NSW) s 43; Transfer of Land Act 1958 (Vic) s 43; Land Title Act 1994 (Qld) s 184; Real Property Act 1886 (SA) ss 186–187; Transfer of Land Act 1893 (WA) s 134; Land Titles Act 1980 (Tas) s 41; Land Titles Act 1925 (ACT) s 59; Land Title Act (NT) s 188.



abound. The Torrens legislation throughout Australia provides many examples of statutory exceptions,<sup>5</sup> with the common law notion of in personam becoming of increasing relevance.<sup>6</sup> However, it has been stated that the greatest threat to the operation and effectiveness of the Torrens system is the capacity of later statutes to override the operation of indefeasibility.<sup>7</sup>

The recent High Court decision of *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* raises this complex issue, with interestingly, a majority of the High Court (McHugh ACJ, Hayne and Heydon JJ, (Kirby J and Callinan J dissenting)) reversing the unanimous decision of the Court of Appeal in New South Wales<sup>8</sup> and a single instance decision of Sheahan J in the New South Wales Land and Environment Court.<sup>9</sup> Perhaps showing the vagaries of the law, of the nine judges who heard this matter, six decided in favour of Heaven's Door Pty Ltd, but it is of course the three in the High Court majority that will form the focus of attention — their decision arguably a narrow interpretation of the potentially overriding statute and implicitly supporting the paramountcy of indefeasibility.

## Facts

The facts of this case are uncomplicated and can be chronologically represented as follows:

- In 1977–1978, a Torrens title property was subdivided into two lots, Lot 1 and Lot 2;
- Council approval for this subdivision was subject to compliance with the following condition (for the benefit of Lot 1 over Lot 2):
  - Provision of a constructed right of carriageway from [Lot 2] . . . The track shall be at least 2.5 metres wide and constructed with 150mm consolidated thickness of gravel.
- In 1978, Council gave final approval to the registered subdivision (Deposited Plan 601049) — This plan indicated that there was a 'proposed right of way 10 wide'.<sup>10</sup> This was to provide access to Lot 1 through Lot 2.
- The two certificates of title issued for Lots 1 & 2 referred to the proposed right-of-way, even though no easement had been created.
- In 1981, Lot 2 was further subdivided (the new deposited plan was given the identifier 1003396), with each of the plans of subdivision

5 Of which fraud is the major exception: Real Property Act 1900 (NSW) s 42; Transfer of Land Act 1958 (Vic) ss 42, 44; Land Title Act 1994 (Qld) s 184; Real Property Act 1886 (SA) s 69I; Transfer of Land Act 1893 (WA) s 68; Land Titles Act 1980 (Tas) s 40; Land Titles Act 1925 (ACT) s 58; Land Title Act (NT) s 188.

6 *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 is the major Australian statement of this. A more recent and controversial application is *Tara Shire Council v Garner* [2002] QCA 232; cf *LHK Nominees Pty Ltd v Kenworthy* [2002] WASCA 291. See also P Butt, 'Indefeasibility and Knowing Receipt of Trust Property' (2002) 76 *ALJ* 606.

7 See P O'Connor, 'Exceptions to Indefeasibility of Title' (1994) 19 *MULR* 649 at 651.

8 (2002) 55 NSWLR 446.

9 (2001) 116 LGERA 138.

10 It should be noted that it was presumed to be 10 m, though no unit of measurement was given in the plans.



showing a 'proposed right of way 10 wide'. The subject matter of the litigation became Lot 529 in Deposited Plan 1003396 (part of the original Lot 2 on plan 601049).

- From 1990, for reasons that were unexplained, the certificates of title benefited and burdened by the proposed right-of-way did not include any notation to it — though there was some 'cryptic reference to a deposited plan by number which did contain that information'.<sup>11</sup>
- In early 1998, Heaven's Door purchased Lot 1.
- In late 1998, Hillpalm purchased Lot 529 of plan 1003396 (part of the original Lot 2).
- [2004]: Could Heaven's Door insist upon the creation of a right-of-way in its favour?

### **McHugh ACJ, Hayne and Heydon JJ**

The first claim made by the respondent was that the appellant was in breach of condition of a development consent. This was to be understood by reference to the Environmental Planning and Assessment Act 1979 (NSW) (the EPAA).

Section 4 of the EPAA defined 'development' as follows:

- (a) the use of the land, and
- (b) the subdivision of land, and
- (c) the erection of a building, and
- (d) the carrying out of work, and
- (e) the demolition of buildings all work, and
- (f) any other act, matter or thing referred to in s 26 that is controlled by an environmental planning instrument,

but does not include any development of a class or description prescribed by the regulations for the purposes of this definition.

Section 76A(1) then provided:

If an environmental planning instrument provides a specified development may not be carried out except with development consent, a person must not carry the development out on the land to which the provision applies unless:

- (a) such a consent has been obtained and is in force, and
- (b) the development is carried out in accordance with the consent and the instrument.

It followed from these provisions that if, by an environmental planning instrument, (it was conceded that this existed in this case) that permission was given to subdivide land, then such subdivision must occur in accordance with the consent given. According to the respondent, and accepted by the lower courts, this permission required the construction of a right-of-way.

The majority in the High Court did not accept this. As they note: 'The more fundamental point made by the appellant was that, even if the correspondence which passed between the surveyor and the Council,<sup>12</sup> or the depiction of a

<sup>11</sup> [2004] HCA 59 at [111].

<sup>12</sup> For example in a 1978 letter from the Council to the applicant undertaking the subdivision, it was stated that: 'This acceptance is conditional upon the rural/residential estate development proceeding. Consequently your client company shall be required to declare by statutory document as a condition of subdivision that a right of carriageway over the existing

'proposed right of way 10 wide' on the plan of subdivision did constitute a condition to which the Council approved the subdivision, that condition was not enforceable against the appellant'.<sup>13</sup>

The reasoning of the majority rested on a narrow interpretation of the relevant legislation. Section 123 of the EPAA provided that:

Any person may bring proceedings in the court for an order to remedy or restraint a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach.

Furthermore, s 122(a)(i) of this same legislation indicated that a breach of the Act includes 'a contravention of or failure to comply with the [the Act]. By s 122(b)(iii), a reference to the legislation includes 'a consent granted under [the Act], including a condition subject to which a consent is granted'.

In the view of the New South Wales Court of Appeal, two reasons supported the position of Heaven's Door — both of which were rejected by the High Court. The first basis was known as the 'objective contravention' point; the second, the right in rem argument.

### Objective Contravention

On the first point, the High Court first addressed the following comments made by Hodgson JA in the New South Wales Court of Appeal:

If the development in question is a subdivision, then the later owner of the subdivided land or of a subdivided part of it may not be guilty of any breach of the [EPAA], but nevertheless, so long as the land remains subdivided in accordance with the development consent without a condition of that consent being fulfilled, *there is objectively speaking a continuing contravention of the condition*; and s 123 of the [EPAA] then gives power to the Land and Environment Court to order the rectification of the contravention by such person as is able to do so, again irrespective of what appears on the title of the land. (emphasis supplied by High Court).<sup>14</sup>

This reasoning was rejected by the High Court.<sup>15</sup> An order pursuant to s 123 of the [EPAA] directed to a person who was not in breach of the Act would neither remedy nor restrain any breach. Recognising that this could be seen as an unduly narrow interpretation of s 123, the High Court majority added:<sup>16</sup>

To read s 123 in this way does not lead to any artificial, let alone absurd, result; it does not strip s 123 of utility. In the common case where the relevant development of the land is a particular permitted use of the land, any person who uses the land in some other way carries out a development of the land (by using it in that other way), contrary to the consent that was given. It matters not whether the user of the land was the applicant for consent . . . But in the present case the relevant development was not the *use* of the land; the relevant development was the *subdivision*.

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track shall be created in favour of the proposed rural lot if the new roads are not dedicated within two years of the date of this letter.' Quoted at [2004] HCA 59 at [20].

<sup>13</sup> [2004] HCA 59 at [39].

<sup>14</sup> [2004] HCA 59 at [46]; quoting from (2002) 55 NSWLR 446 at 449 [19].

<sup>15</sup> [2004] HCA 59 at [48].

<sup>16</sup> [2004] HCA 59 at [49].

In essence, it was the reading of the provisions that was necessary to determine the rights of the parties. Given that, in this instance the appellant and the respondent were successors in title to the original parties, the EPAA could not be used to enlarge the personal rights, unless a right in rem could be established in respect of the land. It is this point to which the High Court then turned.

### Right in Rem

In the New South Wales Court of Appeal a right in rem was established. Meagher JA (Handley JA agreeing) commenting that: '[T]he Council's consent to the subdivision operates to create a right in rem, so that it may be relied on (inter alia) by all later transferees of any lot. This has been decided by a long series of cases at both a State and Federal level.<sup>17</sup> It has also been decided that the transferee from time to time of any lot which has the apparent benefit of any condition may enforce that condition.' Given this in rem right, the right established by the EPAA took precedence over the principle of indefeasibility established within Torrens legislation — the EPAA was the later enactment.<sup>18</sup>

The direct conflict that such a position would take with Torrens legislation was addressed by the High Court:

If the Council's consent to the subdivision operates to create a right in rem that may be relied upon by any later transferee of any lot in the subdivision, that would present a fundamental question about how the creation of such a right would be consistent with the effective operation of a system of Torrens title. In particular, the existence of such a right would be inconsistent with [the notion of indefeasibility]

...

If the consent to the subdivision did create a right in rem, that would be a right or interest in the land not shown on the Computer Folio Certificate. There would then be a real and lively question about how the two statutory schemes (the scheme under the EPAA and the Torrens system for which the Real Property Act provides) were to be reconciled, and questions of implied repeal or amendment might arise.<sup>19</sup>

In the instant matter, the right seeking to be enforced by the respondent was to have a right of way created. It was not to have the register rectified.<sup>20</sup> Accordingly, the respondent could only assert a personal right, and the only provision cited in support of that was s 123 of the EPAA. For the reasons given earlier, s 123 did not support such a right.<sup>21</sup>

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<sup>17</sup> No cases were cited by his honour in support of this proposition. However, as Radan notes, in the Land and Environment Court cases were cited in support, though 'it is far from clear that they support the proposition that the council's consent created an in rem right'. P Radan, 'Indefeasibility and Overriding Statutes' (2003) *Law Society Journal* (July issue) 66 at 67.

<sup>18</sup> *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* (2002) 55 NSWLR 446 at 449.

<sup>19</sup> [2004] HCA 59 at [51–53].

<sup>20</sup> [2004] HCA 59 at [53].

<sup>21</sup> [2004] HCA 59 at [55].

### Kirby J (in dissent)

The focus of his honour's judgement was on the broader policy rationale of ensuring 'social justice',<sup>22</sup> between the parties, rather than merely administering justice 'inter partes'. This forms the central distinction between this judgment and the majority. The majority considered that the finding of any right in the respondent, (personal or in rem) had to be located in the statutory provisions, and these alone.<sup>23</sup> There was no basis for this in the legislation. By contrast to this, Kirby J was only prepared to examine the legislation in light of the overarching policy of land management legislation. In a quote worthy of repeating in detail, the reason for this was as follows:

The reason for the breadth of this principle lies in essential purpose of planning law to land management and use. That purpose is to ensure, relevantly, that the basic purposes necessary to that task are observed and conditions essential to a modern interdependent society observed. Apart from the considerations already mentioned, one has only to think of societies that do not protect the environment and land-based infrastructure, but permit developments to occur without observance of overall planning control and environmental protection. It is because of the chaos that can ensue in such circumstances that the ultimate focus of planning regulation law is the land itself. It is not, as such, merely their ephemeral ownership or possession of the land.

Were it otherwise, planning law could easily be circumvented by changes of ownership and possession immediately following the imposition of conditions upon proposed development of the land. This is a reason why it is a fundamental mistake to read [the legislation] strictly, so as to confine their application to those who owned or possess the subject land at the time applicable conditions were imposed. Yet that is what the majority do in this appeal.<sup>24</sup>

Given the philosophical foundation that land management legislation must be interpreted with the broader focus of public policy in mind, a wider interpretation of s 122 of the EPAA easily followed. Section 122 of the EPAA indicates that a breach includes 'a contravention of or failure to comply with . . . a condition subject to which a consent is granted'. Accordingly, even though the appellant may not have contravened the condition, it had failed to comply with this condition. Kirby J added: 'There are, with respect, dangers in posing the question solely as to whether a party is "in breach of the Act"'. This is not an accurate paraphrase of the EPAA when the extended definition of "breach" is taken into account. Here the "breach" was a "failure to comply".'<sup>25</sup>

Furthermore, and accepting that any diminution of Torrens legislation was not something to be taken lightly,<sup>26</sup> his honour considered that there was no need to treat the EPAA as 'repealing or amending the RPA pro tanto'.<sup>27</sup> In the circumstances of this case, the Acts merely operated sequentially. The title of

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<sup>22</sup> [2004] HCA 59 at [72].

<sup>23</sup> [2004] HCA 59 at [50].

<sup>24</sup> [2004] HCA 59 at [73–74].

<sup>25</sup> [2004] HCA 59 at [86].

<sup>26</sup> [2004] HCA 59 at [97].

<sup>27</sup> [2004] HCA 59 at [102].

the appellant was indeed clear, until the order was made by the Land and Environment Court.<sup>28</sup>

### Callinan J (in dissent)

The judgment of Callinan J supported the interpretation of the EPAA given by Kirby J. In essence, that legislation does not confine a remedy to an action against a person who has been directly been in breach of the Act — a breach also includes a failure to comply. Hillpalm had failed to comply with the condition requiring the creation of a right of way. Furthermore, his honour concluded with some pertinent observations.

This litigation should never have occurred and possibly never would have, had the Council been diligent in enforcing its conditions, and perhaps if the Registrar General had not, so far as the evidence goes, inexplicably allow the explicit and detailed reference to the proposed right of way formally appearing there, to drop off the folio in the Register for the appellant's land. It might not even have happened had there been no such creature as the proposed right-of-way . . . a somewhat anomalous interest, serving no necessary purpose, at best barely compatible with the *intent* of the RPA, and seemingly unique to New South Wales.<sup>29</sup>

### Implications of the decision

The Court of Appeal decision, if it had been left unturned would have imposed very significant obligations on conveyancers. They would be required to search Council records and determine if all the conditions creating the subdivision had been met.<sup>30</sup> In many respects the search techniques would have mirrored those that were required when undertaking a conveyance of general law or old system title land. The 'certainty, efficiency and speed in settlements for purchasers, vendors and others interested in dealings in land being able to rely on the face of the register'<sup>31</sup> would have been substantially lost. Because of this reason, the majority decision is to be welcomed.

The very basis of the Torrens title is that one need not look behind the curtain, and can rely on the reflection given by the mirror to ascertain the true state of the title.<sup>32</sup> Any requirement that requires conveyancers to search beyond the register will only increase conveyancing costs for consumers, lead to delayed settlements and uncertainty in the application of the law. Unfortunately, the judges in our highest Court did not see it necessary to examine in detail the extent of the overriding legislation exception to indefeasibility,<sup>33</sup> a matter which is still of considerable debate.<sup>34</sup> However, by

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28 [2004] HCA 59 at [102].

29 [2004] HCA 59 at [130].

30 See the comments by Radan, above n 17 at 67.

31 [2004] HCA 59 at [97].

32 On this topic, see M Hughson, M Neave and P O'Connor, 'Reflections on the Mirror of Title: Resolving the Conflict between Purchasers and Prior Interest Holders' (1997) 21 *Melbourne University Law Review* 460.

33 See cases such as *South-Eastern Drainage Board case* (1939) 62 CLR 603; *Horvath v Commonwealth Bank of Australia* [1999] 1 VR 643; *Pratten v Warringah Shire Council* [1969] 2 NSWLR 161.

34 For example in *Quach v Marrickville Municipal Council* (1990) 22 NSWLR 55 at 61, doubt

implication, their narrow reading of the EPAA demonstrates an affinity with the principles of indefeasibility and the requirement, that should later legislation qualify the principle of indefeasibility that this be expressly articulated. As Callinan J noted, provided that the people responsible for drafting legislation keep the 'elementary truth in mind' that planning and real property legislation should complement each other, then disputes of this nature should not occur.<sup>35</sup> Furthermore, this case tells us of the dangers of an electronic register, with the notation to a proposed right of way replaced by a reference to a deposited plan. The compliance obligation of Councils to ensure that all the conditions attaching to a subdivision are met is also self-evident. On reading this case, the primary conclusion that one comes to is that this was litigation that need never have occurred. It is this lesson that the stakeholders involved with the administration of the Torrens system need to heed.

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was cast on the correctness of the decision of the New South Wales Court in *Pratten v Warringah Shire Council* [1969] 2 NSWLR 161. *Pratten* was decided on the basis that there existed a discrete class of interests applicable to statutory interests which override indefeasibility. O'Connor also questions this on the basis that the correct approach is to ask whether the provision is in conflict with the Torrens legislation, and determine the effect of this by examining its text and purpose. O'Connor, above n 7 at 668.

35 [2004] HCA 59 at [110].



# The common law abandonment of easements on Torrens land — Can it be done, and, if so, should the intent of predecessors in title be taken into account?

Lynden Griggs\*

*A number of recent decisions have highlighted the question of whether a common law abandonment of easements can occur in respect of Torrens title land in circumstances where the title to the dominant tenement makes express reference to the easement. Though not having to resolve this question, as abandonment was in fact found not to occur, the courts pondered the difficult question of whether abandonment can be permitted, and perhaps more critically, whether it was only the acts of the current registered proprietor that could be taken into account, or whether the conduct and intent of previous owners should also be considered. The argument that will be made that common law abandonment should not be permitted, and if it is (by legislative direction), then only the conduct and intent of the current registered proprietor should be considered. Support for this reasoning will be found in an examination of what the goals of Torrens are, as well as consideration of economics, both neoclassical and behavioural.*

## Introduction

Recent decisions on the abandonment of easements have raised, but not answered, the question as to whether an easement over Torrens land can be abandoned pursuant to common law principles. Related to this is perhaps the more fundamental question — the extent to which the acts of previous registered proprietors can be considered as part of the evidence of abandonment.<sup>1</sup> If we do recognise that common law abandonment can occur even though the certificate of title of the dominant owner stills identifies an easement appurtenant to the land, are the fundamental principles that underlie Torrens (the curtain, mirror and indemnity and with it immediate indefeasibility of title)<sup>2</sup> being substantially and significantly undermined. With these questions in mind, the purpose of this article is to answer these queries from first principles. What are the goals and objectives of the Torrens system,

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<sup>1</sup> This question was first raised by P Butt, 'Abandonment of Easement' (2005) 79 ALJ 331 at 332 with reference to the NSW Court of Appeal decision of *Ashoil Holdings Pty Ltd v Fassoulas* (2005) NSW ConvR 56-125.

<sup>2</sup> It is of course recognised that debate still occasionally rages as to whether immediate or deferred indefeasibility should apply. For example, argument still surrounds whether volunteers should be entitled to indefeasibility: cf *Valoutin v Furst* (1998) 154 ALR 119 with *Conlan v Registrar of Titles* (2001) 24 WAR 299. See P Radan, 'Volunteers and Indefeasibility' (1999) 7 APLJ 197.

and should we allow the title of the dominant tenement to be impeached by common law notions and by the acts of those before the current registered proprietor. Accordingly, Part 1 of this article will consider the principles of common law abandonment with Part 2 examining these principles in their contemporary application to Torrens cases. Part 3 will comment on the goals of the Torrens system, with Part 4 outlining the reasons why common law abandonment should not be permitted, and in those jurisdictions where arguably this is expressly permitted by the legislation that the acts of the previous registered proprietors should not be permitted to be taken into account. Support for these conclusions will be found in the aims of title by registration, neoclassical and behavioural economics.

### Part 1: The principles of common law abandonment

To demonstrate abandonment, the owner of the dominant tenement is required to exhibit an unequivocal intent to abandon.<sup>3</sup> There must be a 'fixed intention never at any time thereafter to assert the right himself or to transmit it to anyone else'.<sup>4</sup> This will be a question of fact,<sup>5</sup> with the onus of proof resting with the individual seeking to assert that abandonment has occurred.<sup>6</sup> Part abandonment of an easement can occur,<sup>7</sup> and, as intention is required, lack of knowledge of the easement by the dominant tenement will mean that the easement has not been abandoned.<sup>8</sup> Once abandoned, the easement cannot be revived.<sup>9</sup> It has also been argued that reliance by the servient owner on the abandonment by the dominant owner must also exist, or that abandonment is far more likely to succeed if there is reliance by the servient owner on the intent of the dominant owner to abandon.<sup>10</sup> It has never been easy to establish. Sovereign rule is the key ingredient of proprietary interests, an individual is entitled to retain an interest even though they do not utilise it to the full. Arbitrary spoliation of a proprietary interest is not to occur unless there is cause.<sup>11</sup> Thus, for example, non-use for 175 years was, in the individual circumstances before the court insufficient to show abandonment,<sup>12</sup> nor was

3 *Wolfe v Freijahs Holdings Pty Ltd* [1988] VR 1017; *McIntyre v Porter* [1983] 2 VR 439; *Re Eddowes* [1991] 2 Qd R 381.

4 *Tehidy Minerals Ltd v Norman* [1971] 2 QB 528 at 553 per Buckley LJ; [1971] 2 All ER 475.

5 *Treweeke v 36 Wolseley Road Pty Ltd* (1973) 128 CLR 274; 1 ALR 104.

6 *Corinne Court (Owners of) 290 Stirling Street Perth Strata Plan 12821 v Shean Pty Ltd* (2000) 23 WAR 1 at 23–4.

7 *Proprietor Strata Plan No 9968 v Proprietors Strata Plan No 11173* [1979] 2 NSWLR 605.

8 *Couche v Adams* [200] NSWSC 27; *Shelmerdine v Ringen Pty Ltd* [1993] 1 VR 315.

9 *Yip v Frolich* (2003) 86 SASR 162 at [58].

10 C J Davis, 'Abandonment of an Easement: Is it a Question of Intention only' [1995] *The Conveyancer* 291. The author argues that a loss of an easement should only occur if it would otherwise be unconscionable and, for this to happen, there must be reliance by the servient owner, from which an estoppel can be raised. As an example see *Swan v Sinclair* [1924] 1 Ch 254.

11 *Wilson v Anderson* (2002) 213 CLR 401; 190 ALR 313 at [140].

12 *Benn v Hardinge* (1992) 66 P & CR 246 (this was explained by the fact that throughout the period the dominant tenement and the predecessors had enjoyed an alternative means of access. For a recent Australian case where non-use for 40 years was held insufficient to constitute abandonment, see *Long v Michie* [2003] NSWSC 233 (unreported, 7 April 2003, BC200301490) (easement not used by dominant tenement from 1941 to the 1980s).



suspension of use.<sup>13</sup> However, if an individual acquires other proprietary rights because of non-use, then abandonment may be easier to trace,<sup>14</sup> and the longer that an easement has not been used, the more likely that it will be abandoned.<sup>15</sup> While a précis of the law can textualise the difficulties, the High Court decision in *Treweeke v 36 Wolseley Road Pty Ltd*<sup>16</sup> provides a more stark illustration of the difficulties facing anyone seeking to meet the burden of proving that an easement has been abandoned. The High Court held that abandonment had not occurred despite the easement becoming impassable because of an impenetrable bamboo clump, the building of a swimming pool, the construction of a fence and the non-use in its entirety for some 40 years. Despite these difficulties, modern development and perhaps a loss of community have seen abandonment cases proliferate in relatively recent years. The next Part examines these authorities, but begins with consideration of the relevant legislation.

## Part 2: Application to the common law principles of abandonment to recent Torrens cases

### The legislation

In a number of jurisdictions (New South Wales, Victoria, Western Australia and Tasmania), the Torrens legislation provides that easements that have been abandoned can be removed from title by the Recorder of Titles.<sup>17</sup> Non-use for a specified period (20 years in New South Wales, Western Australia and Tasmania and 30 years in Victoria)<sup>18</sup> will amount to proof that there has been abandonment. Despite this similarity between these jurisdictions, fundamental and opposing views remain. For example, in Victoria, it has been held that an easement remains enforceable while it is on the certificate of title — acts amounting to common law abandonment will not suffice to prevent the conclusive evidence proffered by the title applying.<sup>19</sup> By contrast, in New South Wales, the converse is true — the indefeasibility provided by title will give way to the common law recognition that the easement has been abandoned by the dominant tenement. This reasoning in New South Wales is

13 *Sunset Properties Pty Ltd v Johnston* (1975) 3 BPR 9185 (suspension of use on Sundays).

14 See *Moore v Rawson* (1824) 3 B & C 332; 107 ER 756 (easement of light abandoned where wall demolished which contained the windows, and servient owner had constructed a new building which he would not have been able to do if the easement had remained in existence).

15 *Treweeke v 36 Wolseley Road Pty Ltd* (1973) 128 CLR 274 at 288; 1 ALR 104:

I think that the longer [non-use] continues the more readily will the conclusion be reached that the person entitled to the benefit of the easement may be deemed to have abandoned it, unless of course there is proof of facts or circumstances which provide a satisfactory explanation for the non-user and which negative any intention of abandonment.

See also *McIntyre v Porter* [1983] 2 VR 439.

16 (1973) 128 CLR 274; 1 ALR 104.

17 See, eg, Real Property Act 1900 (NSW) s 49; Transfer of Land Act 1958 (Vic) ss 73–73A; Transfer of Land Act 1893 (WA) s 229A; Land Titles Act (Tas) s 108(2).

18 Real Property Act 1900 (NSW) s 49(2); Transfer of Land Act 1893 (WA) s 229A; Land Titles Act 1980 s 108(3) and Transfer of Land Act 1958 (Vic) s 73(3).

19 *Riley v Penttila* [1974] VR 547 at 574; (1974) 30 LGRA 79 at 106.

based on the identified legislative intent behind s 89 of the Conveyancing Act 1919. This section provides, and is replicated in Queensland, Western Australia, Tasmania and the Northern Territory,<sup>20</sup> that:

(1) Where land is subject to an easement or a profit a prendre or to a restriction or an obligation arising under covenant or otherwise as to the user thereof, the Court may from time to time, on the application of any person interested in the land, by order modify or wholly or partially extinguish the easement, profit a prendre, restriction or obligation upon being satisfied: . . .

(b) that the persons of the age of eighteen years or upwards and of full capacity for the time being . . . by their acts or omissions may reasonably be considered to have abandoned the easement . . .

As noted by Walsh J in *Treweeke* in commenting on the interpretation of this section:

The [second] proposition is that even where the dominant land and the servient land are registered under the Real Property Act and notifications of the existence of the easement appear on the certificates of title relating to both parcels of land, the easement may become liable to be extinguished and may cease to be enforceable by the person for the time being registered as proprietor of the dominant tenement . . . The second of them must be accepted because of the express provision contained in the [legislation] . . . The provision clearly contemplates that orders will be made which affect rights which were vested in the registered proprietor, according to the state of the register, at and after the time when he acquired his title to the dominant tenement. It is, of course, the function of the court to give effect to the intention which it finds to be expressed in the provision, *notwithstanding that it may operate as a limitation upon the conclusiveness of the register*, which is conferred, as to matters of title, subject to specified exceptions, by the provisions of the [legislation].<sup>21</sup>

Despite the apparent clarity in this legislation to allow common law principles to override the effect of the Register, the legislation fails to address that more fundamental point — is it only the conduct and intent of the current registered proprietor that is relevant, or is it possible to consider the acts of previous registered proprietors.

In the remaining States and Territories (South Australia and the Australian Capital Territory), the law is presumably following the Victorian authority — the certificate of title will be conclusive evidence of the state of the title, therefore the easement remains enforceable until removed.<sup>22</sup>

These legislative differences, (despite highlighting the need for a national approach to land registration) leave open for analysis the issue at first principles — should common law abandonment apply in a system where the title is neither historical nor derivative, and if the answer to that is yes, should

20 NSW: Conveyancing Act 1919 s 89; Qld: Property Law Act 1974 s 181; WA: Transfer of Land Act 1893 s 129C; Tas: Conveyancing and Law of Property Act 1884 s 84C and the NT: Law of Property Act s 177.

21 *Treweeke v 36 Wolseley Road Pty Ltd* (1973) 128 CLR 274 at 285 per Walsh J (emphasis added); 1 ALR 104.

22 For example, s 73 of the Victorian Transfer of Land Act 1958 s 73 states that: '(1) A registered proprietor may make application in an appropriate approved form to the Registrar for the deletion from the Register of any easement in whole or in part where I has been abandoned or extinguished.' Real Property Act 1886 (SA) ss 64, 90B; Land Titles Act 1925 (ACT) s 103E.

the subjective mental state of a predecessor in title to the dominant owner be part of the formal equation in deciding that the intent to abandon does in fact exist. Contrast the following comments (the first emanating from New South Wales, the second from Victoria):

I am bound to hold that, in considering whether an easement should be held to have been abandoned, where a notification of that easement appears on both certificates of title, *I must have regard to the acts of omissions of registered proprietors who were predecessors in title of the present registered proprietor.*<sup>23</sup>

Each [*Riley v Penttila* and *Webster v Strong*], however, provided further and more direct support for the conclusion I have reached [that the easement had not been abandoned]. Each stands for the proposition that an *easement notified on the certificate of title remains enforceable by the proprietor of the dominant tenement even though at common law it would be taken to have been abandoned.*<sup>24</sup>

Given this diversity of opinion, the next section of this article considers the recent cases where this issue has arisen. What they will illustrate is twofold:

- A confirmation that abandonment at common law is extraordinarily difficult to establish; and,
- That the judiciary has considered, but not answered the question under discussion — with this leading to the need for the present analysis.

### The New South Wales cases

The first case to consider is *Ashoil Holdings Pty Ltd v Fassoulas*.<sup>25</sup> The appellant sought to extinguish an easement over its land. The respondents were the registered proprietors of the dominant tenement and had become so in 1995. The easement was created in 1920 and remained on both titles. The right of way concerned adjoining properties that fronted onto the main road and ran down the boundary between the properties. Originally provided to allow access to the rear of the properties, it had remained largely unused. From 1935, alternative access to the rear had been established and furthermore, from at least 1966, if not earlier, a paling fence had blocked access to the right of way, with this replaced subsequently by gates. Furthermore, in the 1970s, a development proposal by the then owner of the benefited land would have seen the right of way extinguished — however this development did not proceed. The court held that these facts were insufficient to constitute abandonment. Taking into account all matters, there was inadequate evidence to establish that a firm intent existed on the part of the dominant tenement's predecessors to abandon title. Evidence of non-use due to the paling fence or the gates did not meet the requisite standard. Similarly, the development proposal having been abandoned provided no support for intent to abandon. Furthermore, while the alternative access may have seen non-use of the original right of way, this did not transmit into verification of

<sup>23</sup> *Proprietors Strata Plan No 9,968 v Proprietors Strata Plan No 11,173* [1979] 2 NSWLR 605 at 616 (emphasis added).

<sup>24</sup> *Wolfe v Freijahs' Holdings Pty Ltd* [1988] VR 1017 at 1025 (emphasis added).

<sup>25</sup> (2005) NSW ConvR 56-125.

intent to abandon.<sup>26</sup> Because of these findings of fact, it was not necessary to consider the deeper questions of the relationship between indefeasibility and the paramountcy of the register with the common law notion of abandonment. As Handley JA succinctly asked, while leaving it open for resolution:

Where both tenements are under common law title the court, in considering the question of abandonment, can have regard to the acts and omissions of the persons who owned the dominant tenement since the easement was created. It is not clear that the position is the same when the titles are under the [Torrens legislation] . . . [The question is also open] when the dominant tenement is under the [Torrens legislation, whether it is necessary] to establish that the current registered proprietor, as one of the persons for the time being entitled, has also abandoned the easement.<sup>27</sup>

In 2006, these views of Handley JA were acknowledged in the Supreme Court of New South Wales decision of *Walker v Bridgewood*,<sup>28</sup> but again, not answered. The right of way granted in 1899 conferred the right on the servient owners to be able to pass and repass along the right of way delineated in the plan with or without horses, carts, carriageways or wagons laden or unladen. The century passed since this grant had seen little use of the right of way, but this was found not to constitute abandonment. No firm and fixed intent to abandon was in evidence.<sup>29</sup> In commenting on the instant debate, Gzell J considered that it is open to question whether, in respect of Torrens land, that it is necessary to show that the current registered proprietor has demonstrated intent to abandon.<sup>30</sup>

### The Victorian cases

In *Riley v Penttila*,<sup>31</sup> a subdivision plan was prepared whereby the blocks backed onto a common area known as 'Outlook Park Reserve'. The developer, himself retaining ownership of the Reserve granted the right to the transferees to use and enjoy the reserve 'for the purposes of recreation or a garden or a park'. Alongside one of the blocks, various owners of the land had fenced off part of the reserve, with this originally being used as a tennis court, but then later as a garden. Within this garden, shrubs, trees, a water reticulation system, two lampposts, clothes hoists had all, at various times been planted or constructed. At the time of the litigation the defendants proposed to build a swimming pool in the disputed area. The plaintiffs, 18 adjoining landowners, sought to challenge this. In deciding in favour of the plaintiffs, the Victorian Supreme Court accepted that a valid easement had been created, that at no stage had it been abandoned, and furthermore, that a claim for adverse possession could not succeed.

26 For a similar case, see *Maier v Bayview Golf Club Ltd* (2004) 12 BPR 22,457 where the court found no evidence of abandonment, despite the dominant tenement never obtaining the keys to allow access through the gate which blocked the right of way and which was locked of an evening. The servient tenement sought to argue that there had been part abandonment, but this was not accepted by the court. There had never been any fixed intent demonstrated by the dominant tenement never at any time to use to the easement outside of daylight hours.

27 (2005) NSW ConvR 56-125 at [4]–[5].

28 [2006] NSWSC 149 (unreported, 29 March 2006, BC200601993).

29 However, the court did hold that the easement had become obsolete.

30 [2006] NSWSC 149 (unreported, 29 March 2006, BC200601993) at [103]–[104].

31 [1974] VR 547; (1974) 30 LGRA 79.

Critically the court's reasoning on abandonment was based on two grounds. The traditional ground of lack of intention was emphasised;<sup>32</sup> however, the Victorian Supreme Court was also prepared to accept that indefeasibility attached to an easement validly registered on title. In coming to this conclusion, Gillard J followed *Webster v Strong*<sup>33</sup> in holding that the system of land registration known as Torrens (and in doing so quoted directly from *Breskvar v Wall*)<sup>34</sup> resulted in the certificate as conclusive evidence of the state of affairs. Therefore, the easement as noted on the title remained an encumbrance until removed pursuant to the relevant statutory provisions:

Until this is done by the Registrar, then, in my opinion, no abandonment in fact will affect the conclusive evidence to be found in the certificate of title that the person named thereon is the owner of the estate in the dominant tenement to which the easement is stated therein to be appurtenant.<sup>35</sup>

This Victorian decision was followed some 12 years later by Tadjell J in *Wolfe v Freijahs Holdings Pty Ltd*.<sup>36</sup> Wolfe sought to remove a registered easement of carriageway over her land. In doing this, she relied on s 73 of the Transfer of Land Act 1958 which permitted her to make an application to the Registrar requesting that an easement be removed where that easement has been abandoned or extinguished. Subsection 3 provides that:

Where it is proved to the satisfaction of the Registrar that any such easement has not been used or enjoyed for a period of not less than thirty years, such proof shall constitute sufficient evidence that such easement has been abandoned.

The company successfully argued that it was entitled to rely on its title to defeat any claim by Wolfe that the easement had been abandoned. The court accepted that to reach such a conclusion did not deny s 73 of an effective operation. This procedural,<sup>37</sup> evidentiary<sup>38</sup> provision was merely designed to allow the servient proprietor to make an application based on 30 years non-use in order to make a case for abandonment. The easement, as it is on title will remain enforceable until it is removed:

abandonment by the registered proprietor of a dominant tenement or by his predecessors in title will not deprive him of the right to rely on the registered easement unless and until it is removed from the Register Book pursuant to s 73 ...<sup>39</sup>

This latter point has also been more recently accepted by the Victorian Court of Appeal in *Shelmerdine v Ringen Pty Ltd*<sup>40</sup> where it was accepted that s 73 does not require the Registrar to determine that an easement has been abandoned despite the passage of the 30 year period where there is evidence which would support the view that at common law, the easement would not have been abandoned.

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<sup>32</sup> Ibid, at VR 570; LGRA 103.

<sup>33</sup> [1926] VLR 509.

<sup>34</sup> (1971) 126 CLR 376; 46 ALJR 68.

<sup>35</sup> [1974] VR 547 at 574; (1974) 30 LGRA 79 at 107.

<sup>36</sup> [1988] VR 1017.

<sup>37</sup> Ibid, at 1023.

<sup>38</sup> Ibid, at 1024.

<sup>39</sup> Ibid, at 1025.

<sup>40</sup> [1993] 1 VR 315 at 339.

### A South Australian case

In *Yip v Frolich*,<sup>41</sup> the plaintiff was the owner of the dominant tenement with the servient tenement immediately to the south of this. Yip conducted a restaurant on the dominant tenement. On both certificates of title, an easement was noted which allowed for:

... full free and unrestricted right and liberty of entry egress and regress from time to time ... and also full free and unrestricted right and liberty ... to break the surface [and] dig open up and use the said lands marked Easement for the purpose of laying down, fixing, taking up, repairing, relaying and renewing pipes therein and of using and maintaining such pipes.<sup>42</sup>

The plaintiff claimed that this easement allowed him to have a right of way over the servient tenement as well as a right to undertake drainage works on the land. The defendant did not dispute that there was a drainage easement, but considered that there was no general right of way, and that in any event, the easement had been abandoned. Besanko J concluded that as a matter of construction, the easement conferred only a drainage easement and that there was no general right of way. Significantly however for present purposes, his Honour considered that the easement remains enforceable so long as it remains on title, even though it may have been abandoned at common law: 'The Court has no power to order the extinguishment of a registered easement on Torrens Title land.'<sup>43</sup> Nevertheless, his Honour did make some observations on the question of where the intent to abandon can be found:

An initial question arises as to whose conduct and intention [to abandon] is to be considered in the case of a registered easement under Torrens title land. It is well established by authority that it is the proprietor's conduct and intention which must be considered and not that of, for example, his tenants ... However, is it the present proprietor's conduct and intention only, or does it include the conduct and intention of previous registered proprietors ... *In my opinion, there is much to be said for the view that each time a transfer of the dominant land takes place, there is, by virtue of such transfer, evidence of an intention by the proprietor of the dominant land not to abandon the easement because the easement is registered on the title.* I noted that Needham J appears to have decided the contrary in *Proprietors of Strata Plan No 9968 and Anor v Proprietors of Strata Plan No 11173 and Ors* [[1979] 2 NSWLR 605] at 614–16, although it is important to remember that the case [was decided in a particular statutory context]. In view of my other conclusions *it is not necessary for me to decide this difficult point* ...<sup>44</sup>

### Overview on the cases and the legislation

The legislation and case authority portrays an issue incoherently answered on a national basis and unresolved by present authority. Victoria, South Australia,

41 (2003) 86 SASR 162 (judgment of Besanko J). The matter did go on appeal (2004) 89 SASR 467 — however this court was not required to consider the issue of abandonment, this aspect of Besanko J's judgment was not appealed: see (2004) 89 SASR 467 at [4]. In this article, the decision of the trial Judge will be examined. It can be noted that the Appellate Court dismissed the appeal — as a matter of construction they, as did the trial Judge, ruled that the easement was only a drainage easement.

42 See (2003) 86 SASR 162 at [4], where the easement is set out in full.

43 Ibid, at [80].

44 Ibid, at [57] (emphasis supplied).

and possibly the Australian Capital Territory, by reason of their legislation and interpretation favour a view that an easement noted on title remains valid irrespective of any common law abandonment. The support for this flowing directly from the conclusiveness of the Torrens title. By contrast, the remaining jurisdictions may well allow for the easement to be considered abandoned even though it remains on title — though the facts to support this will be extraordinarily onerous to establish. However, in all jurisdictions, the question is still open as to whether it is only the intent of the current dominant tenement that can be considered, or whether, (as at common law), the intent of the predecessors in title can also be considered. Should it be the former, the circumstances in which abandonment will be possible in respect of Torrens land will be extraordinarily small.

### Part 3: The goals of Torrens

As noted above, the cases are jurisdiction specific. Therefore, to answer this from first principles, it is necessary to consider the objectives of the Torrens system, with this best understood by an analysis of land registration systems prior to the introduction of Torrens.

#### Land registration systems prior to Torrens

Fundamentally, land title systems have one primary goal — that of ensuring economic efficient transfer of land. How best to manage and facilitate this has long been a goal of society, with early attempts dating back to the fifteenth and sixteenth century and the time of Henry VIII and later, Queen Anne.<sup>45</sup> In a contemporary context, not only does the transfer of land serve and meet the basic human need for shelter, but its assignability is a valuable commercial commodity. Society therefore has a key interest in ensuring that this can be done securely and with a minimum cost. The first method of conveyancing land was known as the feoffment and livery of seisin. This involved the grantor (the feoffer) giving a sod of the soil to the recipient (feoffee), with this person then left in possession. This method was eventually supplanted by a process whereby the purchaser was required to check each and every document associated with the land from the time of the Crown grant until the time of purchase. Accordingly, at common law, and prior to the introduction of statute based registration systems, conveyancing depended upon ensuring that each disposition since the original Crown grant had been properly recorded, and if need be extinguished (such as a mortgage). However, this did not prevent any number of errors creeping into the process, with such mistakes largely undiscoverable. This could include, for example:

- The deliberate removal of a document, leading to an interest being undiscoverable and unknown until post settlement;
- The capacity of the vendor to sell the property to two individuals, with the latter usually having no recourse other than a personal action against the vendor;<sup>46</sup>

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<sup>45</sup> H W B Mackay, 'Registration of Title to Real Estate' (1897) 11 *Harvard L Rev* 301.

<sup>46</sup> *Pilcher v Rawlins* (1872) 7 Ch App 259; *Boyce v Beckman* (1890) 11 LR(NSW) 139.

- The arcane language used in many documents, the true effect of which would be difficult to establish with this necessitating the use of paid conveyancing professionals; and
- Finally, and most critically for present purposes, the search of the documents would not necessarily disclose interests that would be obtained by means other than documentary evidence — such as possessory interests (eg, prescriptive easements, oral tenancies,<sup>47</sup> equitable easements).<sup>48</sup>

Because of these problems, statutory incursions were many and varied. First, the period required to search back was reduced, generally to 30 years.<sup>49</sup> The next step was more dramatic. Legislatures established the system of registration of title, with the party first to register to be given priority,<sup>50</sup> though it did not operate to cure the defects that may have existed in the title prior to registration.<sup>51</sup> In addition, a person registering with notice was still bound by that interest.<sup>52</sup> It was these latter points that ultimately would lead to the Torrens system — the need to correct the errors of the past, and to reduce the cost of transacting. As noted in the original preamble to the Torrens statute of South Australia (Real Property Act 1858), the ‘inhabitants of the Province of South Australia are subjected to losses, heavy costs, and much perplexity, by reason that the laws relating to the transfer and encumbrance of freehold and other interests in land are complex, cumbrous, and unsuited to the requirements of the said inhabitants’. Accordingly, the Torrens system was created, with its notion of indefeasibility, with this meaning that the certificate of title would be seen as conclusive evidence ‘that the person named . . . as the proprietor of or having any estate or interest in . . . the land therein described is seised or possessed of such estate and interest’.<sup>53</sup> This was supported by the statutory recognition that the registered proprietor would only be subject to such estates or interests as indicated on the certificate of title.<sup>54</sup> In addition, the registered proprietor would not be affected by notice of an interest not on the

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47 *White v Neaylon* (1886) 11 App Cas 171.

48 *Darbyshire v Darbyshire* (1905) 2 CLR 787.

49 Conveyancing Act 1919 (NSW) s 53; Property Law Act 1974 (Qld) s 237; Property Law Act 1958 (Vic) s 44; Sale of Land Act 1970 (WA) s 22; Conveyancing and Law of Property Act 1884 (Tas) s 35 (20 year time limit). In South Australia, the period required to search back would be the common law equivalent of 60 years — though this is largely irrelevant, as that jurisdiction has virtually completed the transition of all titles to Torrens title.

50 Conveyancing Act 1919 (NSW) Pt XXIII; Property Law Act 1974 (Qld) ss 241–249; Registration of Deeds Act 1935 (SA); Registration of Deeds Act 1935 (Tas); Property Law Act 1958 (Vic) Pt I; Registration of Deeds Act 1856 (WA).

51 *Re Cooper* (1881) 20 Ch D 611.

52 *Sydney & Suburban Mutual Permanent Building Society & Land Investment Assoc v Lyons* [1894] AC 260.

53 See Land Titles Act 1925 (ACT) s 52; Land Title Act 2000 (NT) s 47; Land Title Act 1994 (Qld) s 46; Real Property Act 1886 (SA) s 80; Land Titles Act 1980 (Tas) s 39; Transfer of Land Act 1958 (Vic) s 41; Transfer of Land Act 1893 (WA) s 63; Real Property Act 1900 (NSW) s 40.

54 See Land Titles Act 1925 (ACT) s 58; Land Title Act 2000 (NT) s 188; Land Title Act 1994 (Qld) s 184; Real Property Act 1886 (SA) s 69; Land Titles Act 1980 (Tas) s 40; Transfer of Land Act 1958 (Vic) s 42; Transfer of Land Act 1893 (WA) s 68; Real Property Act 1900 (NSW) s 42.



title.<sup>55</sup> The change was therefore complete and dramatic. Not only was the purchaser of land no longer required to make comprehensive historical searches, but also the knowledge that they may have of other interests was no barrier to accepting a clear and unencumbered interest. Title was by registration, rather than registration of title.<sup>56</sup> Not only was the process of conveyancing altered, but the substantive law.

### What is the Torrens system

The Torrens system is a positive system, one where the register is conclusive evidence of the state of the title. It does not merely indicate ownership, registration grants ownership. It is the act of registration which provides the indefeasibility and which clears the defects that may have been evident prior to this act. By contrast, a negative system, such as that operable under the Registration of Deeds legislation merely operated to adduce evidence of ownership.<sup>57</sup> In effect, Torrens cured the defects — the fact that registration came about because of a void or voidable instrument was irrelevant. Provided the party registering does not come within a number of exceptions (most notably fraud or in personam), then the Register will operate to validate what would, at common law, have been an ineffectual transaction. Three elements operate to bring about this positivism:

- The concept of the mirror<sup>58</sup> — that is the title reflects precisely what interests affect that parcel of land, with each disposition operating as a surrender and reissue by the Crown,<sup>59</sup> (historical malfeasance was therefore irrelevant)<sup>60</sup>;
- The curtain — that nothing behind the Register would enervate the interests reflected from the mirror; and
- For those adversely affected by the function of this system, compensation would be payable through a State guarantee.<sup>61</sup>

These principles were however, never absolute.<sup>62</sup> A raft of exception was

55 See Land Titles Act 1925 (ACT) s 59; Land Title Act 2000 (NT) s 188; Land Title Act 1994 (Qld) s 184; Real Property Act 1886 (SA) ss 72, 186–187; Land Titles Act 1980 (Tas) s 41; Transfer of Land Act 1958 (Vic) s 43; Transfer of Land Act 1893 (WA) s 134; Real Property Act 1900 (NSW) ss 43/43A.

56 *Breskvar v Wall* (1971) 126 CLR 376 at 385; 46 ALJR 68 at 70.

57 See P E Norman, *Photogrammetry and the Cadastral Survey*, Paul E Norman International Training Centre Series A No 33, Delft, The Netherlands, 1965, cited by P O'Connor, 'Registration of Invalid Dispositions: Who Gets the Property' in E Cooke (Ed), *Modern Studies in Property Law: Vol III*, Hart Publishing, Oxford and Portland, Oregon, 2005, pp 46, 57.

58 L McCrimmon, 'Protection of Equitable Interests under the Torrens System: Polishing the Mirror of Title' (1994) 20 *MonLR* 300.

59 R R Torrens, *The South Australian System of Conveyancing by Registration of Title*, Adelaide, Register and General Observer Printing Offices, 1859, p 9.

60 The title is neither historical nor derivative: *Breskvar v Wall* (1971) 126 CLR 376 at 386; 46 ALJR 68 at 70.

61 Transfer of Land Act 1958 (Vic) ss 109–111; Real Property Act 1900 (NSW) ss 126–127; Land Title Act 1994 (Qld) s 189; Real Property Act 1886 (SA) ss 203–211; Transfer of Land Act 1893 (WA) ss 201–205; Land Titles Act 1980 (Tas) ss 152–153; Land Titles Act 1925 (ACT) ss 145–146; Land Title Act 2000 (NT) ss 192–196.

62 R Atherton, 'Donees, Devisee and Torrens Title: The Problem of the Volunteer under the Real Property Acts' (1998) 4 *Aust J Leg Hist* 121 at 125.

statutorily delineated (such as fraud, misdescription, unregistered leases, omitted easements, adverse possession and conflicting titles), with this also impacted by overriding legislation, claims accepted at common law (such as in personam),<sup>63</sup> and the capacity of the Registrar to correct the Register in stated circumstances.<sup>64</sup> Each exception potentially operating to undermine the effectiveness of the Register and seriously influencing the independence of the Register from the mistakes of history. The question raised in this article is can, and more importantly, should a further basis for exception be made — that of abandoned easements at common law, or should we treat indefeasibility with ‘the utmost respect and [apply it] according to its tenor’?<sup>65</sup> If property law is ‘nothing but a basis of expectation’,<sup>66</sup> then how should the law respond to meet the expectations of the community in this area? Does the security operative on indefeasibility of title operate with such certainty, clarity and hard-edged application that it invariably leads to unfairness?<sup>67</sup> On the other hand, does it provide the crystalline certainty required of an asset so fundamental to human existence that without it, the competition that invariably exists for the scarce resource would result in anarchy and chaos? As Rose notes:

Economic thinkers have been telling us for at least two centuries that the more important a given kind of thing becomes for us, the more likely we are to have these hard-edged rules to manage it. We draw these ever-sharper lines around our entitlements so that we know who has what, and so that we can trade instead of getting into the confusions and disputes that would only escalate as the goods in question became scarcer and more highly valued.<sup>68</sup>

For this reason, and while there is no doubt that the security provided by indefeasibility of title suscitates a largely efficient allocation of resources, with the facility to identify relevant stakeholders easily and the consequential capacity to delineate their entitlements with meticulousness and assurance, the question remains whether this ex-ante homogeneity leads to such unfairness and harshness that it must yield. The laws answer was an unequivocal yes —

63 For an overview, see B Edgeworth, C Rossiter and M Stone, *Sackville and Neave Property Law Cases and Materials*, 7th ed, LexisNexis Butterworths, 2004, at [5.71]ff.

64 Land Titles Act 1925 (ACT) s 14; Land Title Act 2000 (NT) s 17; Land Title Act 1994 (Qld) s 15; Real Property Act 1886 (SA) s 220; Land Titles Act 1980 (Tas) ss 139, 140 and 142; Transfer of Land Act 1958 (Vic) s 103; Transfer of Land Act 1893 (WA) s 188; Real Property Act 1900 (NSW) s 12.

65 Owen J in *Conlan v Register of Titles* (2001) 24 WAR 299 at [196].

66 C Rose, ‘Crystals and Mud in Property Law’ (1988) 40 *Stanford L Rev* 577 at 577, quoting J Bentham, *Theory of Legislation, Principles of the Civil Code*, Pt 1 Ch 8 p 68 (Baxi (Ed), Hildreth translation, 1975).

67 As noted in the context of a property based investment scheme:

In my view there is some (admittedly limited) scope within the recognised exceptions [to indefeasibility] to import notions of fairness. But as the fact situation of the case demonstrates, totally innocent people are going to be hurt by the resolution of the legal issues and their application to the disaster that others have foisted on them. There is no way that the questions raised by this case can be answered without some of the investors, through no fault of their own, being unable to recover all or some of the money they have invested. Accordingly, to use general notions of fairness as a means of implying further exceptions into the statutory scheme is apt to raise as many questions as it will answer. *Conlan v Register of Titles* (2001) 24 WAR 299 at [194].

68 Rose, above n 66, at 577–8.

in certain instances the sharp distinct edge of indefeasibility had to yield. Examples quickly multiplied. The woman whose husband had fraudulently increased the mortgage by an unauthorised use of the certificate of title could prevail over the innocent mortgagee,<sup>69</sup> and the individual who discovered two years after sale that a mistake had led to a block of units being transferred, rather than a vacant block, was entitled to rectification.<sup>70</sup> An option to renew a lease, mistakenly included in the registered lease could also be removed, the lessee's conduct amounting to sharp practice.<sup>71</sup> Knowledge of a breach of trust could also suffice to upset the conclusiveness established by the register.<sup>72</sup> The doctrine of notice, though abandoned by the Torrens system prescript that notice was not to be imputed as fraud,<sup>73</sup> was still able to play a role,<sup>74</sup> and finally, the road to ephemeral redemption was complete, in personam could be established to find a prescriptive easement where there was no evidence that the servient owner had in any way acted unconscionably or had acquiesced in the creation of the easement.<sup>75</sup> The guiding hand of fairness and conscionable conduct was to soften the sharpness of Torrens' idealistic and acutely distinct aims.<sup>76</sup> The crystalline formation of hard-edged property doctrines had given way to the mud of conscionability and justice inter-partes.<sup>77</sup> The issue that will be examined in the next section is the extent to which these ideals should be extended to encompass allowing the common law abandonment of easements to override the indefeasibility established by the register, and allied to this, should the intent of predecessors in title be imputed or attached to the intent of the current registered proprietor of the dominant tenement.

#### **Part 4: Aligning the goals of Torrens with common law abandonment of easements**

In a modern market-driven economy, the starting point for analysis must be economics. This discipline instructs us to recognise that scarce resources need to be allocated to the highest value use and that this can only be done if one is guaranteed with certainty the extent of their entitlement. Transaction and information costs would then be lower,<sup>78</sup> with this translating to a strict interpretation of Torrens — the mirror of the Register forever polished and the

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<sup>69</sup> *Mercantile Mutual Life Insurance v Gosper* (1991) 25 NSWLR 32.

<sup>70</sup> *Lukacs v Wood* (1978) 19 SASR 520.

<sup>71</sup> *Majestic Homes Pty Ltd v Wise* [1978] Qd R 225.

<sup>72</sup> *Tara Shire Council v Garner* [2003] 1 Qd R 556; cf *LHK Nominees Pty Ltd v Kenworthy* (2002) 26 WAR 517; *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133.

<sup>73</sup> See Land Titles Act 1925 (ACT) s 59; Land Title Act 2000 (NT) s 188; Land Title Act 1994 (Qld) s 184; Real Property Act 1886 (SA) ss 72, 186–187; Land Titles Act 1980 (Tas) s 41; Transfer of Land Act 1958 (Vic) s 43; Transfer of Land Act 1893 (WA) s 134; Real Property Act 1900 (NSW) ss 43/43A.

<sup>74</sup> *Moffett v Dillon* [1999] 2 VR 480 (this dispute was treated as one between competing equities).

<sup>75</sup> *Golding v Tanner* (1991) 56 SASR 482; cf *Williams v State Transit Authority of New South Wales* (2004) 60 NSWLR 286; 11 BPR 21,517 where the NSW Court of Appeal expressed considerable unease with the decision in *Golding*. See (2004) 60 NSWLR 286; 11 BPR 21,517 at [116]–[136].

<sup>76</sup> See, generally, J McConvill, 'Equity in the Torrens System' (2000) 8 *APLJ Lexis* 7.

<sup>77</sup> To borrow the language used by Rose, above 66.

<sup>78</sup> C Holderness, 'A Legal Foundation for Exchange' (1985) 14 *Jnl of Legal Studies* 321.

curtain never drawn. The potential purchaser of Torrens land able to rely on the information provided by the register, secure in the knowledge that this is backed by a State guarantee. Accordingly, this would instruct us to find that the current registered proprietor of a dominant tenement cannot lose the benefit of an easement through the notions of common law principles. In addition, the conduct and intent of previous registered proprietors could, under no circumstances, bind or affect the current title holder. Information would not be asymmetric and no deadweight or economic loss would result. Transaction costs would be low and commercial certainty enhanced. In addition, it is now recognised that certainty of property law has a direct relationship with the prosperity of its citizens. 'Laws that ensure the security and transferability of property establish the framework of incentives that enable the creation of new wealth from existing assets.'<sup>79</sup> This is not only supported by the notion that a conveyancing system should protect the reasonable expectations of those who purchase in good faith — the concept of dynamic security,<sup>80</sup> with this dovetailing with the economic beliefs that a lowering of transaction costs through the creation of more certain rules assists the efficient allocation of resources. Importantly, however, nothing is lost even if static security (the idea that preference is given to existing owners) is preferred. Under this scenario, the gain in dynamic security, (through indefeasibility of title) is not counterbalanced by any loss in static security — indeed by the recognition that the easement as noted on the dominant tenement is still valid, with this clarified by purchase, both static and dynamic security are enhanced.<sup>81</sup> Further economic support for suggesting that common law principles need to give way to indefeasibility can also be found in the study of Miceli<sup>82</sup> who found that the Torrens system will lead to higher property values *ceteris paribus* than other forms of land registration.

Behavioural economics also indirectly supports the idea that common law principles of abandonment should not apply to an easement registered on the dominant tenement. Studies indicate that if consumers are given the opportunity of losing \$50, or of relinquishing a gain of the same amount, the individual will choose to relinquish the gain.<sup>83</sup> Applying this to the instant matter, if the decision is that easement has been abandoned, the purchaser of the dominant tenement will feel this loss more significantly, than the gain obtained by the servient tenement — who has seen the removal of the right of the dominant tenement to use that easement. In other words, people are loss averse. They will see the loss of something as greater than the utility associated with gaining that item.<sup>84</sup> 'Because a loss is felt more sharply than

79 P O'Connor, 'Registration of Title in England and Australia: A Theoretical and Comparative Analysis' in E Cooke (Ed), *Modern Studies in Property Law: Vol II*, Hart Publishing, Oxford Portland Oregon, 2003, p 84.

80 See the discussion of the difference between dynamic and static security in O'Connor, above n 79, at 85–6.

81 This may be contrasted with other types of transactions. See O'Connor, above n 57, at 60.

82 T J Miceli, 'Title Systems and Land Values' (2002) 45 *Jnl of Law and Economics* 565.

83 See, generally, D Kahneman, J L Knetsch and R H Thaler, 'Experimental Tests of the Endowment Effect and the Coase Theorem' (1990) 98 *Jnl of Political Economy* 1325.

84 A Tversky and D Kahneman, 'Loss aversion in riskless choice: A reference dependant model' (1991) 106 *Quarterly Jnl of Economics* 1039. See also O'Connor, above n 57, at 62

a forgone gain, there is extra reason to be solicitous about protecting buyers against nondisclosure . . .'<sup>85</sup>

Finally, neoclassical economics has recognised for many years that information and its non-disclosure can create risks of market failure where individuals are unable to distinguish between high quality and low quality items.<sup>86</sup> Thus a potential purchaser of premises, having viewed the certificate of title and seeing the existence of an easement may suffer a surprise post-purchase when an application is made by the servient tenement to have the easement removed with an argument that at common law (and taking into account the interests of previous registered proprietors), the easement has been abandoned. Given that this is not what the purchaser bargained for, if widespread, the market may well become dysfunctional or, perhaps more realistically, see significantly higher transaction costs incurred in the process of search and settlement.

If left at this the answer would be obvious, common law principles should not intervene. The allocations between the parties would be fixed ex-ante, and prevent an amoral grab for amorphous interests. In effect, the rules are certain. However, the law, and particularly when it intersects with economics, is never that clear. As noted by Rose: 'hard-edged crystal doctrines systematically abandon people to the wiles of the bad and the mean-spirited'.<sup>87</sup> For this reason, the law will seek to intervene in appropriate private inter-partes disputes, while at the same time promoting this as an exception to the notion of indefeasibility. Thus in personam, overriding legislation, statutory incursions to indefeasibility, and possessory rights (such as adverse possession)<sup>88</sup> are all seen as exceptions, justified by statutory fiat (such as fraud), or by reference to the recognition that a registered proprietor cannot use the indefeasibility granted by title to forestall the meeting of their personal obligations (such as an obligation to sell the property). In the instant matter some analogy and lessons can be drawn from adverse possession, where the acts of successive adverse possessors can be added together to meet the requirements of the legislation.<sup>89</sup> By contrast, (that other use based land interest) the prescriptive easement, based as it is on the fiction of the lost modern grant, has been held in the South Australian Supreme Court decision of *Golding v Tanner*<sup>90</sup> to be claimable against the current registered proprietor but only where that individual was in possession of the servient tenement throughout the entire period of use. The registered proprietor could then be required to execute the appropriate documents to record the easements.

85 M A Eisenberg, 'Disclosure in Contract Law' (2003) 91 *Calif L Rev* 1645 at 1676.

86 First recognised by G Akerlof, 'The Market for Lemons: Quality Uncertainty and the Market Mechanism' (1970) 84 *Quarterly Jnl of Economics* 488.

87 Rose, above n 66, at 592.

88 Though the position is not uniform throughout Australia, with some jurisdictions not allowing for claims to be made by way of adverse possession. See Transfer of Land Act 1958 (Vic) s 42; Transfer of Land Act 1893 (WA) s 68; Land Titles Act 1980 (Tas) s 138U; Land Titles Act 1925 (ACT) s 69; Land Title Act 2000 (NT) s 198; Real Property Act 1900 (NSW) Pt 6A; Land Title Act 1994 (Qld) s 99; Real Property Act 1886 (SA) s 251.

89 *Mulcahy v Curramore Pty Ltd* [1974] 2 NSWLR 464; *Salter v Clarke* (1904) 4 SR(NSW) 280.

90 *Goldberg v Tanner* (1991) 56 SASR 482; relying in part on *Australian Hi-Fi Pty Ltd v Gehl* [1979] 2 NSWLR 618 and the provisions of the SA legislation: Real Property Act 1886 s 84.

However, the purchaser would not be bound by the acts of her or his predecessor. This acceptance that prescriptive easements could be obtained in respect of Torrens land was however questioned and significantly confined in the NSW Court of Appeal decision in *Williams v State Transit Authority (NSW)*.<sup>91</sup> The court in this case rejected any notion that the doctrine of lost modern grant could extend to the Torrens System. It was to 'pile fiction upon fiction to extend the doctrine of lost modern grant into the Torrens system because . . . that system contemplates title at law as arising only upon registration'.<sup>92</sup> Significantly, the court also went on to make the following strong pronouncements as to the policy basis of the Torrens System:<sup>93</sup>

The Torrens system has its own policies, including the basal concept of title by registration. In any event, as I have endeavoured to show, the adaptation of the doctrine as the basis of a novel personal right involves piling fiction upon fiction . . . To reject the incorporation into the Torrens system of the limited version of the doctrine of lost modern grant suggested by *Golding* is not to deny the effect of the well-established authorities . . . Such incorporation would however stretch the doctrine to breaking point, contradict the basal principles of title by registration and displace long established authority in this State.<sup>94</sup>

Orthodox legal reasoning, combined with classical economics would therefore support that abandonment of Torrens easements, even if those jurisdictions, where it is possible, should only be available where the intent necessary is that of the current registered proprietor. The highest judicial support for this can also be seen in the obiter comments of Brennan J in the High Court of Australia in *Bahr v Nicolay (No 2)*<sup>95</sup> where his Honour recognised that indefeasibility was designed to 'protect a transferee from defects in title of the transferor, not to free him from interests with which he has burdened his own title'.

Applying these ideas to the issue of abandonment of easements on Torrens land, the question that needs to be considered is whether the principles of adverse possession (successive owners can be joined to satisfy the timeframe), or prescriptive easements (where in obiter, the courts appear to recognise that only the acts of the current registered proprietor is applicable) should apply. If we are to depart from an economic view of certainty of title, the loss felt by non-abandonment must be so disproportionate as to outweigh the negative impact that an exception to indefeasibility would countenance. In effect, is the

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<sup>91</sup> (2004) 60 NSWLR 286; 11 BPR 21,517.

<sup>92</sup> *Ibid.*, at [129].

<sup>93</sup> The decision in *Williams* has been subject to some criticism, see P Butt, 'Easements by Prescription; An Update' (2005) 79 *ALJ* 605 at 606:

But in the absence of any transfer of ownership, the re would appear to be no threat to the integrity of the Torrens system in requiring the owner of the servient land to grant an easement to 'lock in' a prescriptive right acquired by 20 years' use against that person. 'Personal equities' of this kind have long been recognised in the Torrens system. See also B Edgeworth, 'The fate of prescriptive easements under the NSW Torrens System' (2004) *Law Society Jnl* (November) 66; M McGuire, 'A New South Wales perspective on implied and prescriptive easements and the rights in personam exception to indefeasibility of title' (2006) 2 *APLJ* 228. Leave to appeal the *Williams* decision to the High Court was refused: [2005] HCA Trans 296 (per Gummow and Callinan JJ).

<sup>94</sup> (2004) 60 NSWLR 286; 11 BPR 21,517 at [133]–[134].

<sup>95</sup> (1988) 164 CLR 604 at 653; 78 ALR 1.

result so dramatically unexpected that the law has no alternative other than to step in and ameliorate the strictness of the rule. The intuitive response to this is no. In addition it must be recognised that this system of title by registration is dramatically different and not, in any way, founded on the common law precepts of possessory title. It is, as noted in *Williams*, founded on the 'basal concept of title of registration'.<sup>96</sup> A similar view was expressed by Barrett J in *Carpenter v McGrath* (in the context of implied easements) that:

The Register remains conclusive and, if it is altered by recognition of an instrument brought into existence pursuant to an order of a court, the new form it thereby assumes is likewise conclusive.<sup>97</sup>

### Conclusion

The notion of one Torrens system is of course a myth. A myriad of differences exist between the Australian States and Territories, let alone, the differences that would come out in a comparison with other overseas jurisdictions. However, it is because of this very reason that those aspects that are generic should be constantly reinforced, and if the opportunity arises to bring a common understanding to a particular branch, then this occasion must be seized. For the reasons noted above it is suggested that common law abandonment of easements noted on the title should not be recognised, and even if this is statutorily required by the terms of the legislation, that the conduct and intent of previous registered proprietors should not be taken into account. Support for this came from a number of sources. First, economics and its appeal to the renitence of rules indicate that the lower transaction costs associated with Torrens title, and the advantages that this gives to commercial certainty, should prevail. Second, static and dynamic security and their appeal to the interests of the prevailing owner and the assistance to the good faith purchaser lend weight to the argument. Finally, work on consumer behaviour highlights that an individual will feel the loss of something more than a commensurate gain. For all of these reasons, the dominant tenement who purchases title with an easement noted on that title should not be subject to losing that interest based on the notion of common law abandonment. The interest should remain effective until removed. Where the legislation appears to provide a different course, the legislation should be limited by recognition that it is only the intent of the current registered proprietor that should be taken into account. It is only by doing this that justice is given to the fundamental theoretical construct of Torrens — each disposition operates a reissue from the Crown and that this provides for immediate indefeasibility. The weight of the argument strongly favours that, in this situation, Torrens title should be given its paramountcy.

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<sup>96</sup> *Williams v State Transit Authority of New South Wales* (2004) 60 NSWLR 286; 11 BPR 21,517 at [133].

<sup>97</sup> (2005) 12 BPR 23,073 at [74]. On appeal from this decision *McGrath v Campbell* (2006) NSW ConvR 56-159, the court also endorsed the idea that the indefeasibility provisions should trump easements allegedly created by implication or prescription. However, it was not necessary for the court to conclude this matter. See (2006) NSW ConvR 56-159 at [118].

# POSSESSION, INDEFEASIBILITY AND HUMAN RIGHTS

LYNDEN GRIGGS\*

*The interaction of land based doctrines with human rights law has, to date, rarely attracted the interest of land lawyers. However, with the surge in human rights jurisprudence, and the European litigation of JA Pye (Oxford) Ltd & Ors v Graham and Ors, it is becoming apparent that human rights may have a significant future role to play in real property law. This paper examines the potential for that conflict in three areas. Two of these areas represent archetypal possession of land doctrines (adverse possession and prescriptive easements), with the third, the ideological foundation stone of registration land systems, indefeasibility. The suggestion is made that any resolution between these established real property doctrines and human rights lies not so much in logic, but in the value judgments that the courts will make in balancing the economic imperatives of the Torrens system with the historical and traditional importance of possession to land ownership. In other words, how we define, determine and allocate realty interests in contemporary Australia.*

## I INTRODUCTION

Australia has recently seen a surge in the evolution of human rights jurisprudence. With Australia as the only common law country without some kind of national charter of human rights,<sup>1</sup> individual States and Territories have assumed the leadership mantle of introducing this to our legal system. For example, Victoria has enacted the *Charter of Human Rights and Responsibilities Act 2006*, with the Australian Capital Territory passing the *Human Rights Act 2004*.<sup>2</sup> However, the Victorian legislation is the only Act which directly impacts on property; section 20 of this providing that ‘A person must not be deprived of his or her property other than in accordance with the law.’

Initially, lawyers may have thought that human rights jurisprudence would have no impact on established land doctrines.<sup>3</sup> However, unquestioning faith in the non-

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<sup>1</sup> Tasmanian Law Reform Institute, *A Charter of Rights for Tasmania*, Issues Paper No 11 (2006) 4.1.1. The Federal Labor Government has also indicated that they place this matter under consideration.

<sup>2</sup> Tasmania has recommended the introduction of such a Charter, Tasmanian Law Reform Institute, *A Charter of Rights for Tasmania*, Report No 10 (2007) recommendation 16 was: ‘The right not to be deprived of property except on just terms.’

<sup>3</sup> J Howell, ‘Land and Human Rights’ (1999) *Conveyancer and Property Lawyer* 287, 287 notes: ‘Historically, property lawyers would have tended to ignore any possible human rights aspects to their work. This is perhaps understandable, it seems axiomatic that anything as home grown as English land law could not be affected by foreign codes.’ See also: A Goymour, ‘Proprietary Claims



applicability of this jurisprudence may ultimately be misguided. For this reason land lawyers will need to, for the moment at least, take a watching brief. A failure to do this may quickly see established property doctrines evaporate in the arguably muddy, amorphous and presumably just waters of human rights. Accordingly, the purpose of this paper is to consider the extent to which a broadly based human rights charter with a stated applicability to ownership of land would impact upon recognised doctrines of real property. For the purposes of this analysis three are considered particularly germane, the first two based on the archetypal property law doctrine, possession (adverse possession and prescriptive easements), with the third the foundation stone of land systems built on registration, indefeasibility.

## II ADVERSE POSSESSION

Based on land's historical recognition of possessory interests, and the idea that only one person can be seized (or possessed) of property at one time,<sup>4</sup> adverse possession provides judicial recognition for the trespasser – that individual who for a requisite period of time<sup>5</sup> utilises land for their own use and excludes others, (including the true owner) from occupation. On one view it turns what would otherwise be a moral wrong into a legal right.<sup>6</sup> By virtue of government fiat, the trespasser is entitled to extinguish the registered, or in the eyes of the community, the true owner's interest in the land - the possessory right having met the judicially crafted criteria eliminating the interest of the registered owner.<sup>7</sup> The rule operates to modify the sovereign principle that an individual can do what they like with their property. The operation and interaction of this land doctrine with human rights is highlighted by the recent European litigation of *JA Pye (Oxford) Ltd & Ors v Graham and Ors*,<sup>8</sup> a decision that on a private law level ended its journey in the House of Lords, but which for Pye and the English Government continued to be litigated in Strasbourg and the European Court of Human Rights.

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and Human Rights – A Reservoir of Entitlement' (2006) 65 *Cambridge Law Journal* 696, 696. As noted there (at 696) is in quoting from *R (on the application of Gangera) v Hounslow LBC* [2003] HLR 68, [49] 'the Convention might fundamentally transform our law as to the enforcement of property rights.'

<sup>4</sup> *JA Pye (Oxford) Ltd & Ors v Graham and Ors* [2002] 3 WLR 221, [70].

<sup>5</sup> Generally either 12 years (*Limitations Act 1965* (NSW) s 27(2); *Limitations of Actions Act 1974* (Qld) ss 13, 24; *Limitation Act 1974* (Tas) ss 18, 21; and *Limitation Act 1935* (WA) ss 4, 30) or 15 years (*Limitations of Actions Act 1958* (Vic) s 8; and *Limitations of Actions Act 1936* (SA) s 4). In the Australian Capital Territory (*Land Titles Act 1925* (ACT) s 69) and the Northern Territory (*Land Title Act 2000* (NT) s 198) there is no limitation period for an action to recover land.

<sup>6</sup> Note the comments of L Fennell, 'Efficient Trespass: The Case for Bad Faith Adverse Possession' (2006) 100 *Northwestern University Law Review* 1037, 1055 who suggests that no legal doctrine can turn a moral wrong into a right. A number of policies are routinely given to provide support for adverse possession. These include that some limitation period is needed to give effect to the status quo, that land owners should not rest on their ownership rights, to protect possessors from stale claims, and finally, in the context of unregistered (or non-Torrens) land, to allow more efficient conveyancing. The seminal statement for these reasons was made by Sir Thomas Plumer MR in *Marquis Cholmondeley v Lord Clinton* (1820) 37 ER 527, 577.

<sup>7</sup> For a discussion of the literature and arguments for and against adverse possession, see Law Reform Commissioner of Tasmania, *Report on Adverse Possession and other Possessory Claims to Land*, Report No 73 (1995).

<sup>8</sup> [2002] 3 WLR 221; [2002] UKHL 30 (House of Lords); [2005] EGLR 1 (15 November 2005; European Court of Human Rights, Chamber judgment 10 judges sitting); [2007] All ER (D) 177 (Grand Chamber Judgment, 17 judges sitting).

A *JA Pye (Oxford) Ltd & Ors v Graham and Ors*

The personal representatives of Graham claimed an entitlement to 25 hectares of registered land owned by the corporate plaintiff Pye. In 1983, a commercial agreement was reached between the parties entitling Graham to use the disputed area to graze livestock. The agreement was to last for 11 months. The only method of access to the land was through a gate, for which Graham had a key. The agreement expired at the end of the 11 months,<sup>9</sup> but the parties were unable to renegotiate a new agreement. Despite the lack of agreement, Graham and his family continued to use the land and from September 1984 the land was used without permission. In 1985, Graham did seek to contact the plaintiffs about an agreement. Pye, professional real estate developers, failed to respond. In 1997, Graham lodged cautions with the Land Registry claiming to be entitled to the land based on adverse possession. Pye sought to challenge those cautions, and when Graham died, his wife and estate lodged further cautions against the land. In 1999, Pye began proceedings to seek possession of the disputed land. The facts indicated that from the period of 1984 to 1997, Graham had tilled the land, fertilised and limed it, and during that period had never vacated the land. The land was used primarily for grazing though in 1994 parts of the land became arable. In giving the leading judgment, Lord Browne-Wilkinson summarised the critical issue: ‘The question is simply whether the defendant squatter has dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner.’<sup>10</sup> According to the House of Lords any suggestion that possession depended on the intention of the true owner was ‘heretical and wrong.’<sup>11</sup> Furthermore, it was not necessary to consider that there must be some form of ‘confrontational, knowing removal of the true owner from possession.’<sup>12</sup> With these principles in mind, there was no question that Graham had possessed the land for the requisite time. His title could trump that of the registered owner. Ownership to land worth £10 000 000 (on the registered owner’s view), or £380 725 - £1 150 500 (according to the view of the United Kingdom government)<sup>13</sup> was to pass to the trespasser without compensation payable to the plaintiff.<sup>14</sup>

This conclusion was not to pass without critical comment by the House of Lords. It was arrived at ‘with no enthusiasm’,<sup>15</sup> and was unfair, not ‘in the absence of compensation, although that is an important factor, but in the lack of safeguards against oversight or inadvertence on the part of the registered proprietor’.<sup>16</sup>

<sup>9</sup> The agreement was constructed to avoid the Grahams obtaining security of tenure under the *Agricultural Holdings Act 1948* (UK).

<sup>10</sup> *JA Pye (Oxford) Ltd & Ors v Graham and Ors* [2002] 3 WLR 221, [36] emphasis my own.

<sup>11</sup> Ibid [45]. Similar principles would seem to operate in Australia. See: *Kierford Ridge Pty Ltd v Ward* [2005] VSC 215, [126] where the Court adopted the principles stated in *Powell v McFarlane* (1979) 38 P & CR 452. *Powell v McFarlane* was adopted by the *JA Pye (Oxford) Ltd & Ors v Graham and Ors* [2002] 3 WLR 221, [31].

<sup>12</sup> *JA Pye (Oxford) Ltd & Ors v Graham and Ors* [2002] 3 WLR 221, [38] (Lord Browne-Wilkinson).

<sup>13</sup> These figures were quoted in the European Court of Human Rights decision *JA Pye (Oxford) Ltd & Ors v Graham and Ors* [2005] EGLR 1, [78]-[9].

<sup>14</sup> The developed value of the land was near £21 000 000.

<sup>15</sup> *JA Pye (Oxford) Ltd & Ors v Graham and Ors* [2002] 3 WLR 221, [2] (Lord Bingham of Cornhill), quoting from the Trial Judge Neuberger J, *JA Pye (Oxford) Ltd & Ors v Graham and Ors* [2000] Ch 676, 709-10.

<sup>16</sup> *JA Pye (Oxford) Ltd & Ors v Graham and Ors* [2002] 3 WLR 221, [73] (Lord Hope of Craighead).

## B      *The European Court of Human Rights – Chamber Judgment*

In the House of Lords, an argument based on human rights was not pursued – it was accepted that the *Human Rights Act 1998* (UK) did not have retrospective effect to a matter that arose prior to its introduction.<sup>17</sup> However two judges in the Court of Appeal<sup>18</sup> did make passing reference. Mummery LJ framed the matter as involving the blocking, through limitation periods, of access to court, and not as a deprivation of property. Furthermore, the 12-year time limit was reasonable and did not impose an undue burden on any landowner.<sup>19</sup> Therefore there was no breach of human rights. Similarly, Keene J characterised this as a question concerning limitation rights,<sup>20</sup> and as these were not incompatible with the Convention, no breach had occurred.

After the House of Lords decision, Pye took the matter to the European Court of Human Rights alleging that it had been deprived of its land in a way that was incompatible with Article 1 of Protocol No 1. This reads:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Four arguments were presented by the government as reasons why the legislation did not breach human rights.

First, adverse possession qualified or modified property rights at the time of acquisition. In other words, when Pye became the owner it was subject to the limitation periods and principles of adverse possession upon becoming registered. That is, every owner has the potential to lose land by way of adverse possession after they become the registered owner. Ownership is not subject to this condition as an added extra, the notion of land ownership includes this as an integral component. This was vehemently rejected by the majority of the Court (Pellonpää P, Bratza, Strážnická, and Pavlovschi JJ), who held the registered title was absolute and not subject to any limitation or restriction. ‘It was the operation of the [legislation] which brought to an end ... the applicant’s title and not any inherent defect or limitation in that title.’<sup>21</sup> The adverse possession legislation only became operative at the time when 12 years had passed (the period of limitation), not at the time of acquisition.<sup>22</sup>

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<sup>17</sup> Ibid [65]. The applicant was thus required to go to Strasbourg for a remedy.

<sup>18</sup> *JA Pye (Oxford) Ltd & Ors v Graham and Ors* [2001] Ch 804.

<sup>19</sup> Ibid [43].

<sup>20</sup> Ibid [46]. Contrast the view of D Rook, *Property Law and Human Rights* (Blackstone Press, 2001) 207: ‘[I]s the ability to commence court proceedings to recover property from a trespasser a fundamental characteristic of property ownership? If it is, the loss of the right to commence court action impinges upon the very nature of property ownership and cannot be artificially dissected from it and treated as separate from it.’

<sup>21</sup> *JA Pye (Oxford) Ltd & Ors v Graham and Ors* [2005] ECLR 1, [50].

<sup>22</sup> Ibid [52]: By contrast, the [English legislation] are in the view of the Court to be seen as ‘biting’ on the applicants’ property rights only at the point at which the Grahams had completed 12 years’ adverse possession of the applicants’ land and not as delimiting the right at the moment of its acquisition. As discussed by Goymour, above n 3, 712, the difficulty is in deciding whether the

Second, it was argued deprivation was not the result of government action; rather the loss was the consequence of Pye neglecting to monitor their land holdings. What was deprived was, (as the Court of Appeal in *Pye* had agreed), their right of access to court, not their property.<sup>23</sup> Again, this failed to sway the European Court. The legislation alone acted to remove the applicants of their title and see that transferred to the Grahams – legislation for which the State was responsible.<sup>24</sup>

The third argument was that the State, through its limitation provisions was controlling use, rather than removing the proprietary or possessory rights of Pye. This submission similarly held no weight – the fact that the land was transferred between individuals, rather than to the State, led to the conclusion that this was a deprivation, rather than a control.<sup>25</sup>

Finally, on the question of proportionality, the majority in the European Court saw the result as one of exceptional severity to the applicant. Acquisition of property without compensation could only be permitted in exceptional circumstances. Given that the government of the United Kingdom had recognised the inadequacies of the law (through amendments in the *Land Registration Act 2002*), the conclusion was established that this upset the fair balance between the public interest and the individual's enjoyment of their own possessions.<sup>26</sup>

By contrast to the majority, the minority (Maruste, Garlicki, and Borrego JJ) saw the matter very differently. Disagreeing with the majority that ownership was absolute, and considering that the majority had been unreasonably swayed by the legislative changes and judicial statements that criticised the doctrine,<sup>27</sup> they concluded that Pye should have been aware that their property ownership was subject to 'restrictions, qualifications and limitations imposed by legal requirements.'<sup>28</sup>

This view of the minority has seen academic support. For example, Jones considered that Article 1 of the First Protocol was not even engaged by the law of adverse possession. He suggests that a fundamental error was made by the Strasbourg Court on the basis that Article 1 protects what a person 'has or has been led to legitimately expect that they are to have.'<sup>29</sup> Ownership of land is always subject to adverse possession, yet the 'applicant was wrongly allowed to depart Strasbourg entitled to precisely that,

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legislation operates to shift a proprietary entitlement, or whether the right is inherently limited from the start.

<sup>23</sup> *JA Pye (Oxford) Ltd & Ors v Graham and Ors* [2005] EGLR 1, [53].

<sup>24</sup> *Ibid* [56].

<sup>25</sup> *Ibid*[58]-[62].

<sup>26</sup> *Ibid* [75]. However, as noted by RG Lee, 'Less than Nine Points: Adverse Possession and the Right to Peaceful Enjoyment of Property' [2006] *Journal of Business Law* 853, 858, the new English legislation still provides no right to compensation. As noted by the decision of the European Court of Human Rights, *In the Case of Hellborg v Sweden* (Application no 47473/99, [46]) (a decision which applied *Pye*), the Court examines whether the measure taken by the State was lawful, in the general interest and whether a 'fair balance' was struck between the demands of the public and the protection of the individual's fundamental rights.

<sup>27</sup> *JA Pye (Oxford) Ltd & Ors v Graham and Ors* [2005] EGLR 1, [4] (Maruste, Garlicki and Borrego JJ). The matter should have been examined as if the legislative changes had not been made.

<sup>28</sup> *Ibid* [2] (Maruste, Garlicki and Borrego JJ).

<sup>29</sup> O Jones, 'Down with the Squatters! The European Court of Human Rights and *JA Pye (Oxford) Ltd v United Kingdom*' (2006) 25 *Civil Justice Quarterly* 404, 408.

ownership free from the risk of adverse possession.’<sup>30</sup> It was the tenor of the minority judgments and the academic support for them that were adopted by the majority in the Grand Chamber Judgment.

### C *The European Court of Human Rights - Grand Chamber Judgment*

The Court held, by a narrow majority of 10 votes to seven that there had been no violation of Article 1 of Protocol No 1. Significantly the majority<sup>31</sup> held that the statutory provisions which had eliminated Pye’s title were not intended to deprive paper owners of their title, but to regulate questions of title.<sup>32</sup> Unlike the majority in the earlier chamber hearing, who had concluded that, as the property was taken by a private litigant, the dispute was about deprivation, this Court considered that the failure of the State to recover the property for themselves necessarily led it to be a control of use, rather than a deprivation. The second paragraph of Article 1 of Protocol No 1 was engaged, not the first.<sup>33</sup> With this as its starting point, and with consideration given to the comparative position,<sup>34</sup> the Grand Chamber considered that a fair balance had been struck within the legislation. Even in the case of registered land, it was open to the legislature to attach greater weight to the fact of possession rather than the act of registration.<sup>35</sup> Furthermore, and whilst accepting that there must be a reasonable relationship of proportionality<sup>36</sup> and that a fair balance must be struck, States are to enjoy a wide margin of appreciation, ‘with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object in question.’<sup>37</sup> The applicant companies were also not denied procedural protection – the law on adverse possession should not have come as a surprise to them and, despite amendments tightening the operation of the principle, the facts of the case must be considered in light of the law as it stood at the time.<sup>38</sup> Limitation periods must also operate irrespective of the amount of the claim, the value of the land lost by Pye was of no consequence.<sup>39</sup>

By contrast to the majority judgment, the minority dissenting opinion of Rozakis, Bratza, Tsatsa-Nikolovska, Gyulumyan and Šikuta JJ focussed far more on the operation of principles relevant to registered land than to the precepts of limitation. This, it is respectfully submitted, sits at the core of the differences between the majority and minority – to what extent should possessory based principles clothed within limitation be subsumed or superior to the tenets of land registration. In their Honour’s view, limitation had to be subjugated. Whilst they agreed that the matter stood to be dealt with under ‘control of use’, rather than ‘deprivation of possessions’, any resolution had to

<sup>30</sup> Ibid 408.

<sup>31</sup> *JA Pye (Oxford) Ltd & Ors v Graham and Ors* [2007] All ER (D) 177, 1 (Costa, Zupančič, Lorenzen, Cabral Barreto, Butkevych, Baka, Zagrebelsky, Mularoni, Jaeger, Ziemele JJ).

<sup>32</sup> Ibid [66].

<sup>33</sup> Ibid. For a case note on the Grand Chamber judgment, see: M Dixon, ‘Adverse Possession, Human Rights and Land Registration: and They all Lived Happily Every After?’ (2007) 71 *Conveyancer* 552.

<sup>34</sup> *JA Pye (Oxford) Ltd & Ors v Graham and Ors* [2007] All ER (D) 177, [72].

<sup>35</sup> Ibid [74].

<sup>36</sup> Ibid [75].

<sup>37</sup> Ibid.

<sup>38</sup> Ibid [81].

<sup>39</sup> Ibid [84]. For a cogent criticism of the application of Article 1 (first or second paragraph) to adverse possession claims, see: O Jones, ‘Out with the Owners! The Eurasian Sequels to *JA Pye (Oxford) Ltd v United Kingdom*’ (2008) 27 *Civil Justice Quarterly* 260, 265-266.

recognise that the law of adverse possession could only be justified by factors over and above the law of limitation.<sup>40</sup> In this instance, the fair balance required had not been met. They considered the contrast between the gravity of the interference and the justification for that interference was so significant that substantial injustice would result from allowing the principle of adverse possession to override the registered owner's title. With registered land ownership depending on registration and not on possession, the traditional reasons to justify adverse possession lost much of their weight.<sup>41</sup> Similarly, the lack of compensation, whilst not of itself making the loss of land disproportionate, '[makes] the loss of beneficial ownership the more serious and required, in our view, particularly strong measures of protection of the registered owner's property rights if a fair balance was to be preserved.'<sup>42</sup> The legislative changes could also not be ignored – they were brought about, not as a natural evolution, but as a substantive legal change to what was seen as a principle variously described as leading to 'draconian, unjust, illogical and disproportionate'<sup>43</sup> results. The dissenting opinion of Loucaides and Kovler JJ was along similar lines, with their Honours considering that adverse possession shows disrespect for the rights and responsibilities of legitimate registered owners and can only serve to encourage the 'illegal possession of property and the growth of squatting.'<sup>44</sup>

### III PRESCRIPTIVE EASEMENTS

Prescriptive easements operate to provide legal effect to the de-facto state of affairs brought about by possession.<sup>45</sup> As with adverse possession, the doctrine has also been subject to significant criticism in three Australian States,<sup>46</sup> and a majority of an English Law Reform Committee recommended the total abolition of prescriptive easements.<sup>47</sup> Unlike adverse possession, however, there is no harmony between the Australian States as to their applicability in a system of title by registration. In New South Wales, prescriptive easements are presumably not available because of the decision of the Court of Appeal in *Williams v State Transit Authority*.<sup>48</sup> In Queensland, prescriptive easements are also not possible.<sup>49</sup> By contrast, in Victoria,<sup>50</sup> Tasmania,<sup>51</sup> and Western

<sup>40</sup> *JA Pye (Oxford) Ltd & Ors v Graham and Ors* [2007] All ER (D) 177, [7] (of minority opinion).

<sup>41</sup> *Ibid* [11] (of minority opinion).

<sup>42</sup> *Ibid* [16] (of minority opinion).

<sup>43</sup> *Ibid* [21] (of minority opinion).

<sup>44</sup> *Ibid* [8] (of minority opinion of Loucaides and Kovler JJ).

<sup>45</sup> For a discussion of the differences between limitation and prescription, see: P Omar, 'Limitation and Prescription in English Law: Arguments and Pressures for Reform' (2006) *Australian Property Law Journal Lexis* 12, 18 -28 of online version.

<sup>46</sup> Law Reform Commission of Victoria, *Easements and Covenants*, Discussion Paper No 15 (1989); Law Reform Committee 1987); Law Reform Commission of Tasmania, *Report and Recommendations for Reform of Fifteen Conveyancing Matters*, Report No 36 (1984).

<sup>47</sup> Law Reform Committee, *Fourteenth Report (Acquisition of Easements and Profits by Prescription)* (Cmnd 3100) (1966) 11. Interestingly a recent review of the law of easements in the United Kingdom has not, as least as far as its consultation paper is concerned taken that view: see: The Law Commission, *Easements, Covenants and Profits à Prendre*, Consultation Paper No 186 (2008) <[www.lawcom.gov.uk/easements.htm](http://www.lawcom.gov.uk/easements.htm)> at 10 April 2008.

<sup>48</sup> (2004) 60 NSWLR 286. Special leave to appeal to the High Court was refused [2005] HCA Trans 296. See the criticism of this conclusion by P Butt, *Land Law* (LawBook Co, 5<sup>th</sup> ed, 2006) 781.

<sup>49</sup> *Property Law Act 1974* (Qld) s 198A. See also: A Bradbrook and M Neave, *Easements and Restrictive Covenants in Australia* (Butterworths, 2<sup>nd</sup> ed, 2000) 249-50.

<sup>50</sup> *Transfer of Land Act 1958* (Vic) s 42(2)(d).

<sup>51</sup> *Land Titles Act 1980* (Tas) pt IXB, div 2.

Australia,<sup>52</sup> prescriptive easements can exist in respect of Torrens land. The matter is unresolved in the other jurisdictions.<sup>53</sup> This division within States as to the appropriateness of prescriptive easements not only reflects drafting differences between the States, but arguably the deeper issue of uncertainty as to the extent that possessory rights should influence Torrens title. If allowing title by adverse possession without compensation to the registered owner amounts to a breach of human rights, the same result could arguably apply to lesser proprietary rights. However, as was shown in *Oxfordshire CC v Oxford City Council*,<sup>54</sup> (in the context of the *Commons Registration Act* 1965 and a claim for a village green) the owner of land still retains their title (unlike adverse possession) even though a possessory interest may be claimable against this title. Nevertheless, without any consistent basis for their inclusion,<sup>55</sup> and cross-jurisdictional support for their abolition, a person's title, which has been lessened by way of a prescriptive easement, would have a strong basis on which to allege a breach of human rights, (that is, that a deprivation of property has occurred). Support for this view can be found in the cases on abandonment of easements, with strong judicial authority that common law abandonment of an easement cannot occur until it has been removed from the title.<sup>56</sup> The only possible retort is that property, in its current context is not so much about exclusion, but about access, and that every individual is entitled to the right of movement, subject to the mutual obligation of respect inherent in living alongside and with others. As noted by Sara:<sup>57</sup>

Instinctively we feel that land, certainly open land, should not be restricted to its owners. If there is a lane leading to my property, I should be allowed to use it. If my drain runs under the land of another, he should not be allowed to block it. If I want to walk up Snowden or walk in the woods I should be allowed to do so. This is all part of the unspoken idea, enshrined in the common law from the beginning, that ownership of land is far from absolute. It is qualified by right to freedom of movement, the right or liberty of every person to make use of land providing that he does not harm others and the duty of the owner of the land to assert his ownership.<sup>58</sup>

This idea that the stability, rigidity and certainty of property ownership is now being inflicted by public law notions of legitimate expectation, fairness and conscience is also recognised by Gray.<sup>59</sup>

The language of 'property' begins to disclose a deep subtext of social 'propriety' in opposition to its once more common connotation of appetitive economic power.... The claims of civic property endorsed by the new equity comprise merely the assertion of latent human entitlements which have long been submerged by superficial allocations of formal title.<sup>60</sup>

<sup>52</sup> *Di Masi v Piromalli* [1980] WAR 57.

<sup>53</sup> See generally: Bradbrook and Neave, above n 49, ch 11.

<sup>54</sup> [2006] 4 All ER 817.

<sup>55</sup> Various reasons have been suggested, including natural justice, acquiescence, the fiction of a lost grant, community convenience – see generally: C Sara, 'Prescription – What is it for' (2004) *Conveyancer and Property Lawyer* 13.

<sup>56</sup> *Wolfe v Freijahs Holdings Pty Ltd* [1988] VR 1017, applied in *Bookville Pty Ltd v O'Loughlen* [2007] V ConvR 54-734. The matter has also been raised but not answered in *Ashoil Holdings Pty Ltd v Fassoulas* [2005] NSWCA 80; *Walker v Bridgewood* [2006] NSWSC 149. Compare *Proprietors of Strata Plan No 9968 and Anor v Proprietors of Strata Plan No 11173 and Ors* [1979] 2 NSWLR 605.

<sup>57</sup> See Sara, above n 55.

<sup>58</sup> *Ibid* 17.

<sup>59</sup> K Gray, 'Equitable Property' (1994) 47 *Current Legal Problems* 157.

<sup>60</sup> *Ibid* 208.

It is this latter aspect that is critical to the topic under consideration. How in a system of title by registration, where not only is assertion of ownership established by registration, but the substantive requirements of ownership are met by registration, do we balance the competing possessory rights with the registered rights? Does the possessory right have to give way to the indefeasibility obtained by registration? There is a fundamental difference between registered and unregistered land. One depends for its formality on possession (unregistered land), with registration the sole criterion for title of registered, or Torrens land. On the other hand, should the inculcation of human rights on or over Torrens demand that indefeasibility ameliorate to broader community oriented notions – for example, the notion that property will cease to be solely concerned with enhancing individual welfare, but which implicitly contains a recognition that all ‘interests in land’ (with this meant in the wide sense of encompassing the concerns of stakeholders) lie interdependent upon each other? Will this recondite sense of property counter the view of Lord Wilberforce who argued that registered land systems, ‘intended as it was to provide a simple and understandable system for the protection of title to land should not be read down or glossed – to do so would destroy the usefulness of the Act ... the Act itself providing a simple and effective protection for persons in the [unregistered interest holder’s position] – viz by registration.’<sup>61</sup>

#### IV INDEFEASIBILITY

As readers would be aware, the Torrens process of land registration is a positive, bijural system.<sup>62</sup> It does not merely recognise rights, it creates them. A failure to register can bluntly result in a loss of entitlement, or at least priority.<sup>63</sup> This conclusion is arguably compounded by the acceptance of immediate indefeasibility.<sup>64</sup> As Howell notes,<sup>65</sup> a right lost through failure to register may well be seen as an expropriation of a property interest without compensation, with this leading to a violation of the very Article discussed in *Pye*. With this comment made before *Pye*, the risk has, in no way been diminished by that decision. Whilst the response to this may be simple – the loss of the interest is as a consequence of what an individual failed to do, rather than any act of the State,<sup>66</sup> it masks the far deeper question of how this will mesh with human rights considerations. In responding to this conflict between Torrens and human rights, the Scottish Law Commission’s discussion paper on land registration<sup>67</sup> sought to balance any conflict by suggesting that any indemnity given to the purchaser of a void transaction should not be by way of indefeasible title (as presently occurs in Australia), but in monetary compensation. In doing so, they respond to the recognition that immediate indefeasibility can be an undeniably harsh and cruel doctrine,<sup>68</sup> and when

<sup>61</sup> *Midland Trust v Green* [1981] AC 513, 528.

<sup>62</sup> Positive in that it provides for the substantive right by the act of registration. Bijural in the way it imposes its own rules: See generally: E Cooke, ‘Land Registration: Void and Voidable Titles – A Discussion of the Scottish Law Commission’s Paper’ (2004) *Conveyancer and Property Lawyer* 482.

<sup>63</sup> See generally: A Bradbrook, A MacCallum and A Moore, *Australian Real Property Law* (Thomson LawBook Co, 4<sup>th</sup> ed, 2002) ch 4.

<sup>64</sup> *Breskvar v Wall* (1971) 126 CLR 376.

<sup>65</sup> Howell, above n 3, 303.

<sup>66</sup> A clear example of that is *Midland Bank Trust Co Ltd v Green* [1981] AC 513.

<sup>67</sup> Scottish Law Commission, *Discussion Paper on Land Registration: Void and Voidable Titles* (2004) <[http://www.scotlawcom.gov.uk/downloads/dp125\\_land\\_reg.pdf](http://www.scotlawcom.gov.uk/downloads/dp125_land_reg.pdf)> at 8 October 2008.

<sup>68</sup> *Breskvar v White* [1978] Qd R 187 illustrates how harsh it can be. In this case, the sequel to *Breskvar v Wall* (1971) 126 CLR 376, the claimants were statute barred from gaining compensation from the assurance fund, as they were outside the time limit. This conclusion was reached despite the claimants being unaware until the decision in *Breskvar v Wall* that their claims against the fraudulent



considered in isolation can be seen to bring about unacceptable results. The understanding of this highlights that the case for immediate indefeasibility depends largely on the value judgments associated with conflicting and competing policies.<sup>69</sup>

In an attempt to ameliorate this harshness, the Scottish Law Reform Commission suggested an unusual solution in seeking to balance the extreme position offered by immediate indefeasibility. They recommended that the title of a good faith purchaser should be indefeasible, provided that the person from whom they have bought has been in possession for a prescribed period (possibly a year). As Cooke notes:<sup>70</sup>

This is very strange and appears to run counter to the “mirror” principle of registration. However, the Commission points out, it avoids some human rights problems under the current law. It ensures that “A” [the original registered proprietor] cannot lose his land to D [D having purchased from C as a result of a void transaction, perhaps because of fraud attributed to B] without some equivalent of notification, because for the land to be out of his possession must put him on enquiry.

## V AN ANALYSIS IN THE AUSTRALIAN CONTEXT

As noted by the High Court of Australia in *Mabo v State of Queensland (No 2)*,<sup>71</sup> it is ‘far too late in the day to contemplate an allodial or other system of land ownership.’ Upon European settlement, the Crown acquired radical or ultimate title. The sovereign is the ‘universal occupant’.<sup>72</sup> All land belongs to the Crown and every person<sup>73</sup> holds of, or from the Crown.<sup>74</sup>

Furthermore Brennan J, in *Mabo v Queensland (No 2)*<sup>75</sup> commented that: ‘[the doctrine of tenure] cannot be overturned without fracturing the skeleton which gives our land law its shape and consistency.’<sup>76</sup> Critically, however, what this doctrine informs us is that ownership was not protected; rather it was seisin<sup>77</sup> or possession<sup>78</sup> which enjoyed

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parties would be of no utility. Another example where the result is seen to be harsh is *Canadian Pacific Railway Co Ltd v Turta* [1954] 3 DLR 1 – the Canadian Pacific Railway, by reason of register error, were deprived of \$600 000 worth of petroleum rights. They too, were statute barred.

<sup>69</sup> See: W Taylor, ‘Scotching *Frazer v Walker*’ (1970) 44 *Australian Law Journal* 248, 251.

<sup>70</sup> E Cooke, ‘Land Registration: Void and Voidable Titles – A Discussion of the Scottish Law Commission’s Paper’ (2004) *Conveyancer and Property Lawyer* 482, 490-1.

<sup>71</sup> (1992) 175 CLR 1, 47 (Brennan J).

<sup>72</sup> *AG v Brown* (1847) 2 SCR (NSW) App 30, 35.

<sup>73</sup> Native title aside.

<sup>74</sup> Of course, this system devolved from the Norman conquest, where William the Conqueror passed the following law: ‘We decree also that every freeman shall affirm by oath and compact that he will be loyal to King William both within and without England, that he will preserve with him his lands and honor with all fidelity and defend him against his enemies’ – see: *Medieval Sourcebook - Laws of William of Conqueror*, Fordham University <<http://www.fordham.edu/halsall/source/will1-lawsb.html>> at 9 October 2008.

<sup>75</sup> (1992) 175 CLR 1, 45.

<sup>76</sup> The doctrine has received vehement academic criticism. See for example: J Devereux and S Dorsett, ‘Towards a Reconsideration of the Doctrines of Estates and Tenures’ (1996) 4 *Australian Property Law Journal Lexis* 6, 8-9, describing the doctrine as bizarre and inaccurate.

<sup>77</sup> For a discussion of what is meant by seisin see a series of articles by F W Maitland, ‘The Seisin of Chattels’ (1885) 1 *Law Quarterly Review* 324; ‘The Mystery of Seisin’ (1886) 2 *Law Quarterly Review* 481; ‘The Beatitude of Seisin’ (1888) 4 *Law Quarterly Review* 24.

<sup>78</sup> An example of which is: *Allen v Roughley* (1955) 94 CLR 98.

primacy. There was no law of ownership, merely a law of possession.<sup>79</sup> Legal effect was to be given to the de-facto state of affairs. To do otherwise would amount to an injustice.<sup>80</sup> However, this state of affairs was radically transformed in the 1850's and continues to this day. Title is now based on registration and not on possession. This conflict between registration and possession was the very essence of the dispute in *Pye*. On the one side stood an individual claiming that legal recognition should be given to the state of affairs which if a third party physically viewing the land may perceive to be the actuality. On the other side, stood the registered owner, the individual, who for whatever reason, has not seen fit to remove the trespasser from its land, to not exercise their legal rights, but who suggested that ownership of land is not reliant on a 'view from the street', but on the basis of a properly conducted search of the formal records. In *Pye v Graham*, the House of Lords found in favour of the possessor, the initial chamber of the European Court of Rights identifying this by a bare majority as a breach of human rights, with this overturned by a close split decision of the Grand Chamber. Given this divergence, where does that leave the role of possessory interests, such as adverse possession and prescriptive easements in a Torrens system where 'registration is not merely "a retrospective approbation of [title] as a derivative right"'.<sup>81</sup> With Australia and New Zealand entrenching immediate indefeasibility,<sup>82</sup> though this is far from uniform throughout Torrens jurisdictions<sup>83</sup> is there some logic that can be drawn from the aims of title registration which would answer this conundrum.

## VI AIMS OF TITLE REGISTRATION

A number of reasons can be advanced as to what title registration systems are designed to achieve. First, and with this reason paramount due to the contemporary market driven economy that is embedded within Western society, title registration systems improve economic efficiency.<sup>84</sup> With transaction costs reduced<sup>85</sup> and heightened certainty and

<sup>79</sup> As stated by Cheshire and Burn: E H Burn, *Cheshire and Burn's Modern Law of Real Property* (Butterworths, 15<sup>th</sup> ed, 1994) 27: it may be said without undue exaggeration that so far as land is concerned, there is in England no law of ownership, but only a law of possession.

<sup>80</sup> As noted by the English Law Reform Committee in its report on prescriptive easements, Law Reform Committee, *Fourteenth Report*, above n 47, 5, 'the method by which English law gives legal recognition and effect to various kinds of de facto situations in which the relevant state of affairs has continued unchallenged for so long that to deny it legal recognition would, it is said, amount to injustice.'

<sup>81</sup> WMC Gummow, 'Equity in the Torrens System' (Paper presented at the Taking Torrens into the 21<sup>st</sup> Century conference to mark the 50<sup>th</sup> Anniversary of the Land Transfer Act 1952, Faculty of Law, University of Auckland, 19-21 March 2003) 9, quoting from Windeyer J in *Breskvar v Wall* (1971) 126 CLR 376, 400.

<sup>82</sup> *Breskvar v Wall* (1971) 126 CLR 376; *Vassos v State Bank of South Australia* (1993) 2 VR 316; *Frazer v Walker* [1967] NZLR 1069.

<sup>83</sup> Some argue for deferred or discretionary indefeasibility. See for example: J Mugambwa, 'Transportation of the Torrens System to Developing Countries: Uganda and Papua New Guinea' (Paper presented at the Taking Torrens into the 21<sup>st</sup> Century conference to mark the 50<sup>th</sup> Anniversary of the Land Transfer Act 1952, Faculty of Law, University of Auckland, 19-21 March 2003). See also a discussion of the Canadian position, and reform proposals in respect of this; Joint Land Titles Committee, *Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada* (Edmonton, 1990). Ziff notes that in Canada, immediate indefeasibility is the rule: B Ziff, *Principles of Property Law* (Carswell, 3<sup>rd</sup> ed, 2000) 426. In the New Zealand context, see: E Toomey, 'Fraud and Forgery in the 1990's Can our Adherence to *Frazer v Walker* survive the Strain?' (1994) 5 *Canterbury Law Review* 424.

<sup>84</sup> See: L Griggs, 'Torrens Title in a Digital World' (2001) 8(3) *Murdoch University Electronic Journal of Law*; L Griggs, 'The Assurance Fund – Government Funded or Private' (2002) 76 *Alternative Law Journal* 250.

stability in conveyancing, (at least in a transactional sense), land should move to the person who values it the most. By doing this, the welfare of society is enhanced.<sup>86</sup> However, this efficiency comes at a cost. 'Formal legal rights'<sup>87</sup> must be eliminated. In economic terms the transaction costs associated with alternatives (such as general law or old system title) are so high as to mandate the allocation of a liability based solution to ensure a more effective distribution of resources.<sup>88</sup> To achieve this result the 'legal status of ... property [must] be kept relatively simple and transparent in order to avoid confusion to ... multiple or successive interest holders.'<sup>89</sup>

Second, and allied to the first, land ownership with attendant increased security of transaction leads to increased economic activity.<sup>90</sup> A normative expectation that investment in real estate will lead to a positive outcome generates not only labour and input into the land itself, but security allows for the elimination, or at the least the reduction of, 'moral hazards and adverse selection in the credit market.'<sup>91</sup> A dynamic, active land market is enhanced, if not created. The crystalline rules provide for certainty, stability and ease of transfer.<sup>92</sup>

Third, the Torrens system, by its focus on the dynamic security of the transaction mobilises the resources associated with what would otherwise be a static asset. Land becomes the equivalent of cash, enabling its use to dramatically alter as circumstances warrant.<sup>93</sup> The fundamental goal of efficiently transferring land is attained.<sup>94</sup> A liability, rather than property based model is to be preferred<sup>95</sup> - legislatures considering it cheaper to extinguish the formal legal title of the previously registered owner, in preference to compensating the new registered owner by way of money.

<sup>85</sup> JT Janczyk, 'An Economic Analysis of the Land Title Systems for Transferring Real Property' (1977) 6 *Journal of Legal Studies* 213.

<sup>86</sup> JT Janczyk, 'Land Title Systems, Scale of Operations, and Operating and Conversion Costs' (1979) *Journal of Legal Studies* 569. In particular see 258, the summary. See also: Ontario Law Reform Commission, *Report on Land Registration*, Department of Justice (1971) 135-51.

<sup>87</sup> As noted by: CM Rose, 'Property and Expropriation: Themes and Variations in American Law' (2000) *Utah Law Review* 1, 7-8.

<sup>88</sup> The terms emanating from the work of G Calabresi and A Douglas Melamed, 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral' (1972) 85 *Harvard Law Review* 1089.

<sup>89</sup> Rose, above n 87, 7-8.

<sup>90</sup> It is of course recognised that there is increased dynamic security in the Torrens system, but this does arise at the expense of static security. In other words, the title is subject to an option. See: C M Rose, 'The Shadow of the Cathedral' (1997) 106 *Yale Law Journal* 2175.

<sup>91</sup> JM Ngugi, 'Re-examining the Role of Private Property in the Market Democracies: Problematic Ideological Issues Raised by Land Registration' (2004) 25 *Michigan Journal of International Law* 467, 498.

<sup>92</sup> C Rose, 'Crystals and Mud in Property Law' (1988) 40 *Stanford Law Review* 577, 577-8. 'Economic thinkers have been telling us for at least two centuries that the more important a given kind of thing becomes for us, the more likely we are to have these hard-edged rules to manage it. We draw these ever-sharper lines around our entitlements so that we know who has what, and so that we can trade instead of getting into the confusions and disputes that would only escalate as the goods in question became scarcer and more highly valued.'

<sup>93</sup> See generally: Ngugi, above n 91, 498.

<sup>94</sup> Early attempts dating back to the 15<sup>th</sup> and 16<sup>th</sup> century and the time of Henry VIII and later, Queen Anne. HWB Mackay, 'Registration of Title to Real Estate' (1897) 11 *Harvard Law Review* 301.

<sup>95</sup> See: G Calabresi and A D Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85 *Harvard Law Review* 1089; L Kaplow and S Shavell, 'Property Rules Versus Liability Rules: An Economic Analysis' (1996) 109 *Harvard Law Review* 713.

When combined with immediate indefeasibility, these predominantly economic aims provide a puzzle incapable of solution. With indefeasibility achieving either logical or perhaps legendary status within our Torrens register,<sup>96</sup> and its foundation directly oppositional to possessory interests, how does the jurisprudence find that elusive balance? Who is to be preferred, the majority or minority in the European Court in *Pye*? How are registration and possession to be weighted? The answer, it is submitted lies not so much in logic but in how we define what it means to have an interest in land. Is it simply about excluding others, or is there a wider sense, that proprietary interests include the right to exclude as well as the right *not* to be excluded from use or enjoyment.<sup>97</sup> As Macpherson comments in the context of human rights as property rights:

If we continue to take [property] in the modern narrow sense, the property right contradicts democratic human rights. If we take it in the broader sense, it does not contradict a democratic concept of human rights; indeed, it then may bring us back to something like the old concept of individual property in one's life, liberty, and capacities.<sup>98</sup>

It is only the modern consumer society, and its focus on allocative efficiency,<sup>99</sup> that has seen the narrow construct of exclusionary property become paramount. Competition was to be the driving force, consumption measuring the wealth of the individual. The invisible hand of the market would lead to efficiency, and output within society maximised. The State as an institution existing only to provide the Rule of Law to settle disputes, and to assist in the process of voluntary cooperation. In the context of land registration systems, certainty, stability, speed and expense were the motivating agencies. The system designed to overcome the weaknesses articulated in the original preamble to the Torrens statute of South Australia (*Real Property Act 1858*) the:

inhabitants of the Province of South Australia are subjected to losses, heavy costs, and much perplexity, by reason that the laws relating to the transfer and encumbrance of freehold and other interests in land are complex, cumbrous, and unsuited to the requirements of the said inhabitants.

The blunt weapon of registration and indefeasibility married to bring out the marginalisation of possessory titles. In effect a narrow perception of what property or land is about. It was about exclusion with this defined by registration; the marketability of the land was not to be restricted by any sense of possession. By contrast a system which seeks to somehow balance registration and possession, endorses a notion of access in preference to exclusion.<sup>100</sup> '[This] language of "property" ... [it carries the] responsibility, of a trust to the larger community.'<sup>101</sup> If looked at in this context, possessory interests by giving effect to the de-facto state and permitting access, arguably contribute to a notion of interdependence between the individual, the community, the society and the economic imperatives that may also underlie this.

<sup>96</sup> A Mason, 'Indefeasibility – Logic or Legend?' (Paper presented at the Taking Torrens into the 21<sup>st</sup> Century conference to mark the 50<sup>th</sup> Anniversary of the Land Transfer Act 1952, Faculty of Law, University of Auckland, 19-21 March 2003).

<sup>97</sup> See generally: CB Macpherson, 'Human Rights as Property Rights' (1977) 24 *Dissent* 72.

<sup>98</sup> *Ibid* 74.

<sup>99</sup> See generally: Independent Committee of Inquiry, Parliament of Australia, *Hilmer Report* (1993).

<sup>100</sup> See generally: Gray, above n 59.

<sup>101</sup> *Ibid* 208.

Arguably, our notion of property ceases when fundamental human rights are infringed.<sup>102</sup>

## VII CONCLUSION

Pollock and Maitland comment that:

[I]n the history of our law there is no idea more cardinal than that of seisin. Even in the law of the present day it plays a part which must be studied by every lawyer; but in the past it was so important that the whole system of our land law was about seisin and its consequences.<sup>103</sup>

Today, whilst ownership cannot properly be understood without reference to possession, the existence of the Torrens system, its central tenet of indefeasibility, and its effect on possessory interests, has arguably not truly been recognised. The continued acknowledgment of adverse possession and prescriptive easements illustrates the resonance of seisin, even though formal creation of legal rights is not made until registration. It is this very interaction that highlights the problems that real property lawyers may face if human rights jurisprudence becomes entrenched within our thinking. The importance of property, and in this specific context, land, cannot and should never be underestimated. It is the very core that establishes connection between species and the planet.<sup>104</sup>

For this reason, the stability of land and land registration is critical. It is essential to our economic welfare, as a means of encouraging a productive workforce and, in the wider context of property, has been said to provide the foundation for democratic government.<sup>105</sup> ‘That is why ... Jeremy Bentham said, back around 1800, that in any conflict between equality and security of property, it is imperative that security prevail – even when the inequality is so striking as in the case of serfdom or slavery.’<sup>106</sup> To assist in this means governments have routinely provided a means by which ownership of land is to be recorded and made as transparent as possible. The fragmentation of property interests inherited from the feudal system dependant on there being a way in which a potential purchaser is able to identify an owner of an interest with ease. ‘[The] imperatives of transparency sometimes demand the sacrifice of perfectly good formal claims.’<sup>107</sup> Does this mean that possessory interests must yield, and that in this context, the utilitarian perspective insist that the registration system must impose itself on human rights by overriding possessory based interests?<sup>108</sup> The difficulty with accepting this at

<sup>102</sup> An example of which is slavery: *ibid* 211.

<sup>103</sup> F Pollock and FW Maitland, *History of English Law before the Time of Edward I* (Cambridge University Press, 1968) 29.

<sup>104</sup> As eloquently expressed by K Gray and S Gray, *Elements of Land Law* (Oxford University Press, 2005) 1. ‘Land is elemental: it is where life begins and it is where life ends. Land provides the physical substratum for all human activity; it is the essential base of all social and commercial interaction. We spend scarcely a moment out of contact with terra firma and our very existence is constantly sustained and shaped by the natural and constructed world around us.’

<sup>105</sup> Rose, above n 87, 4.

<sup>106</sup> *Ibid*.

<sup>107</sup> *Ibid* 8.

<sup>108</sup> The jurisprudence from Europe largely indicates that ‘human rights’ does concede its place to property law. See: D Hughes and M Davis, ‘Human Rights and the Triumph of Property: The Marginalisation of the European Convention on Human Rights in Housing Law’ (2006) *Conveyancer and Property Lawyer*. 526.

any level is that possession is about what is in fact occurring. It speaks to third parties, the market, to the world, as to the state of affairs. It reverberates the idea that possession is nine tenths of the law. Its hold on the individual and collective psyche of Australian society is significant. Nevertheless, any undermining of the legal formalism of registration will reverberate on economic markets, and on the faith in title based systems. Without tolerance and respect for the ownership rights of others, with these identified by a public registration system, the regime for land ownership that presently operates in Australia will soon fail.<sup>109</sup> For this reason, it is suggested that as human rights jurisprudence continues to expand, Torrens legislation needs to resolve the inherent tension that may arise between it and human rights. As we move inexorably to a national conveyancing system in terms of process, any harmonisation of the substantive law should address the dilemma posed by the interaction of possessory based principles to a system of title by registration. The type of litigation encapsulated in *Pye* seems little to do with advancing human rights, yet it directly attacks a system of land registration which has successfully served Australia for 160 years. In summary, the questions raised here will not be answered by mechanical formula, the application of economic theory, or by resort to historical reference. It is not about 'protection or redistribution; it is the protection of whom, and the distribution of what.'<sup>110</sup> It is this which must be answered, and with land being in 'defined and limited supply',<sup>111</sup> the answer that should be given, is a strong preference for the precepts, ideals and values provided within and by, the Torrens system of land registration.

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<sup>109</sup> See generally: C Rose, 'Property as the Keystone Right' (1996) 71 *Notre Dame Law Review* 329.

<sup>110</sup> LS Underkuffler-Freund, 'Takings and the Nature of Property' (1996) 9 *Canadian Journal of Law and Jurisprudence* 161, 205.

<sup>111</sup> *Linden Garden Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, 107D (Lord Browne-Wilkinson).



## In personam: *Barnes v Addy* and the High Court's deliberations in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*

Lynden Griggs\*

*With High Court decisions on indefeasibility relatively rare, the judgment of **Farah Constructions Pty Ltd v Say-Dee Pty Ltd** is likely to attract close attention. With important pronouncements on the role of **Barnes v Addy** (alongside strong criticism of the decision of the NSW Court of Appeal), it critically closes state based differences as to the application of this case within the context of the in personam exception. By so doing, it reinforces the paramouncy of indefeasibility.*

### Introduction

There is no doubting the importance of land to the Australian psyche. A significant portion of the population cherishes home ownership,<sup>1</sup> and land is not only the substratum of much of our collective wealth, but represents the spiritual, economic and community link to our everyday existence. It is physically and emotionally the foundation on which we build our lives. For this reason, any differences that exist in the substantive law between states and territories would intuitively be difficult to accept and require persuasive justification. The side of the border on which the title resides should rarely dictate the result of any dispute. For this reason, High Court deliberations in the area of land law are to be welcomed, consolidating and clarifying the law as well as resolving any significant differences between state jurisdictions. In *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*,<sup>2</sup> the High Court has bluntly rejected any application of knowing receipt or knowing assistance principles from *Barnes v Addy*<sup>3</sup> as a basis on which in personam can be used to undermine indefeasibility. By so doing, they rejected the approach taken by the Queensland Court of Appeal<sup>4</sup> and adopted Victorian<sup>5</sup> and Western Australian<sup>6</sup> appellate decisions. With this background in mind, this note will examine the development of 'knowing receipt or assistance' in personam in the state courts and then consider this aspect of the High Court's judgment in *Farah Constructions*.

### What is in personam?

Routinely described as an exception to indefeasibility, it, perhaps more accurately is simply an area where land doctrines do not operate. The essence

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1 The 2006 census statistics indicate that 32.6% residences are fully owned, with another 32.2% being purchased. See <[www.abs.gov.au](http://www.abs.gov.au)> (accessed 29 June 2007).

2 (2007) 230 CLR 89; 236 ALR 209; [2007] HCA 22; BC200703851.

3 (1874) LR 9 Ch App 244.

4 *Tara Shire Council v Garner* [2003] 1 Qd R 556; [2002] QCA 232; BC200203548.

5 *Macquarie Bank v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133.

6 *LHK Nominees Pty Ltd v Kenworthy* (2002) 26 WAR 517; [2002] WASCA 291; BC200206314.

of in personam is that the registered proprietor is not entitled to use the ideology of immediate indefeasibility to deny personal obligations that he or she has given. A simple illustration, taken from the seminal authority of *Frazer v Walker*<sup>7</sup> highlights its role:

- A vendor enters into a contract to sell land to a purchaser;
- After signing of the contract, but before settlement, the vendor has indefeasibility of title,<sup>8</sup> the purchaser an estate contract;<sup>9</sup>
- The vendor argues indefeasibility of title to prevent the purchaser from enforcing the contract;
- In personam overrides indefeasibility (or operates outside its purview) — the purchaser has personal rights against the vendor that can be used to obtain an order for specific performance.

The exception, if so rightly called, is statutorily provided for in South Australia,<sup>10</sup> Queensland<sup>11</sup> and the Northern Territory,<sup>12</sup> with the remaining jurisdictions recognising its common law authority.<sup>13</sup> Before invoking in personam, a recognised legal or equitable cause of action must be established,<sup>14</sup> and it must be unconscientious for the registered proprietor to assert indefeasibility to defeat this identified legal or equitable cause of action.<sup>15</sup> In personam should also not be available where its use would be inconsistent with the policy objectives of the Torrens system.<sup>16</sup>

### **Decisions prior to *Farah Constructions Pty Ltd v Say-Dee Pty Ltd***

The decisions prior to the judgment of the court in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*<sup>17</sup> starkly illustrated the evident difference of opinion as to whether the principles of *Barnes v Addy*<sup>18</sup> should be used to undermine, or prevail over, indefeasibility. In *Barnes v Addy* a person is liable as a constructive trustee where they knowingly received property in breach of

7 [1967] 1 AC 569; [1967] 1 All ER 649.

8 As noted in A J Bradbrook, S V MacCallum and A P Moore, *Australian Real Property Law*, 4th ed, Thomson Lawbook Co, 2007, at [4.100], despite the commonality in the use of the phrase, indefeasibility is only used statutorily in four of the eight jurisdictions (Land Title Act 1994 (Qld) ss 37, 38; Real Property Act 1886 (SA) s 69; Land Titles Act 1980 (Tas) s 40 and Land Title Act 2000 (NT) ss 39, 40), with its meaning in the remaining jurisdictions extracted from the common law cases.

9 *Lysaght v Edwards* (1876) 2 Ch D 499.

10 Real Property Act 1886 (SA) ss 71(d)(e), 49(1)(e).

11 Land Title Act 1994 (Qld) s 185(1)(a).

12 Land Title Act 2000 (NT) s 189(1)(a).

13 Beginning with *Barry v Heider* (1914) 19 CLR 197.

14 *Grgic v ANZ Banking Group Ltd* (1994) 33 NSWLR 202 at 222 per Powell JA (Meagher and Handley JJA agreeing at 203).

15 *Vassos v State Bank of South Australia* [1993] 2 VR 316 at 333 per Hayne J; *White v Tomasel* [2004] 2 Qd R 438 at [30] per Davies JA; *LHK Nominees v Kenworthy* (2002) 26 WAR 517; [2002] WASCA 291; BC200206314 at [199]–[200] per Murray J, [210]–[216] per Anderson and Steytler JJ. Compare *White v Tomasel* [2004] 2 Qd R 438.

16 *Mercantile Mutual Life Insurance Co Ltd v Gosper* (1992) 25 NSWLR 32 at 45 per Mahoney JA; *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133 at 157 per Tadgell J.

17 (2007) 230 CLR 89; 236 ALR 209; [2007] HCA 22; BC200703851.

18 (1874) LR 9 Ch App 244.



trust (knowing recipient liability), or where they knowingly assisted a trustee in misapplying trust property (knowing assistance liability). The recognition of a potential conflict between in personam based on *Barnes v Addy*, and indefeasibility, highlighted by Tadgell JA in *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd*, with his Honour commenting that:

to recognise a claim in personam against the holder of a mortgage registered under [Torrens legislation], dubbing the older a constructive trustee by application of a doctrine akin to 'knowing receipt', when registration of the mortgage was honestly achieved, would introduce by the back door a means of undermining the doctrine of indefeasibility which the Torrens system establishes . . . the proprietary rights of a registered mortgagee of Torrens title land derive 'from the fact of registration and not from an event antecedent thereto'. In truth, I think it is not possible, consistently with the received principle of indefeasibility as it has been understood since *Frazer v Walker* and *Breskvar v Wall*, to treat the holder of a registered mortgage over property that is subject to a trust, registration having been honestly achieved, as having received trust property. The argument that the appellant is liable as a constructive trustee because it had 'knowingly received' trust property should in my opinion fail.<sup>19</sup>

By contrast, a majority of the Queensland Court of Appeal were equally adamant that the principles emanating from *Barnes v Addy* could be used to support an in personam claim. In *Tara Shire Council v Garner, Arcape and Martin*<sup>20</sup> property had been sold by the Garners to the Shire Council. For some unexplained reason, the purchase monies were paid by the council to the Garners, but the change in ownership was never registered. Accordingly, as far as the title was concerned, the Garners remained the registered proprietors. As the purchase monies were not paid, it was arguable that the Garners were trustees for the land on behalf of the council. The Garners then sold the land to Arcape, with Arcape informed that the property belonged to the council. Notwithstanding this, they submitted that indefeasibility prevented their registered title being impugned. The council responded by submitting that Arcape had knowingly received and retained trust property in a manner that was inconsistent with their interest and accordingly in personam operated to dull the effect of indefeasibility.

By a majority,<sup>21</sup> the Queensland Court of Appeal accepted the arguments of the council. Indefeasibility was trumped by equity. As Arcape were informed, they were bound to give effect to the trust. They were not constructive trustees merely because they were agents of the trustee, but because they retained some part of the trust property.<sup>22</sup> Notwithstanding this strong clear view of the majority, in dissent Davies JA commented:<sup>23</sup>

There is no authority, binding or persuasive, for the proposition that the interest of a purchaser of land who becomes registered as owner with knowledge that the transfer to it was in breach of trust by the vendor, let alone that of such a purchaser who becomes registered after the making of no more than an unsubstantiated

<sup>19</sup> *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133 at 156–7 (Winneke P agreeing at 136).

<sup>20</sup> [2003] 1 Qd R 556; [2002] QCA 232; BC200203548.

<sup>21</sup> Atkinson J (with McMurdo P largely agreeing).

<sup>22</sup> [2003] 1 Qd R 556; [2002] QCA 232; BC200203548 at [54].

<sup>23</sup> *Ibid*, at [33].

assertion that an unregistered person is the owner of part of the land is defeasible. Nor is there any basis in principle, for the purpose of the application of s 185(1)(a),<sup>24</sup> for distinguishing an assertion of equitable ownership in an unregistered person from an assertion in such person of some lesser equitable interest. If it were otherwise, the fundamental proposition that the interest of a registered proprietor is not affected by his or her prior knowledge of unregistered interests would need to be modified to accommodate different results depending on the nature of the prior unregistered interest.

The competing arguments present for no easy resolution. On the one hand, lies the stability, certainty, and blunt harshness of the indefeasibility doctrine — it operates at a macro level, without regard to the justice that may need to be done in an individual case, and by application of blind faith objectivity. It is this view that was accepted by a majority of the Western Australian Full Court in *LHK Nominees v Kenworthy*,<sup>25</sup> the minority view of Davies JA in *Tara Shire Council* and majority of the Victorian Court of Appeal in *Macquarie Bank Ltd*. On the other hand, lies the imperative faced by individual judges, deciding specific matter inter-partes, and seeking to achieve fairness between understandably self-interested litigants without any interest in the blind objectivity of the legal system, with this reasoning seeing the majority in *Tara Shire Council*, a minority in *LHK Nominees*<sup>26</sup> and a minority in *Macquarie Bank*<sup>27</sup> using equity to ameliorate the questionable morality of immediate indefeasibility.<sup>28</sup>

### ***Farah Constructions Pty Ltd v Say-Dee Pty Ltd***<sup>29</sup>

The appellant Farah Constructions (Farah) was a company controlled by Farah Elias (the second appellant). This man also controlled Lesmint Pty Ltd (the third appellant), and was the husband of Margaret Elias (the fourth appellant), and father of Sarah and Jade Elias (the fifth and sixth appellants). The respondent Say-Dee Pty Ltd was a company controlled by Dalida Dagher and Sadie Elias, the latter bearing no relation to the appellants. Dagher and Sadie Elias were involved in a number of businesses, though not specifically real estate development. The dispute in this matter revolved around three properties, numbers 11, 13 and 15 Deane Street Burwood. In 1998, Say-Dee agreed with Farah to enter a joint venture to develop units at No 11. Both parties were to be purchasers in equal shares with Say-Dee advancing some \$225,000 to the joint venture. The balance of the funds required was to be

24 This provides for an exception for indefeasibility for an 'equity arising from the act of the registered proprietor': Land Title Act 1994 (Qld) s 185(1).

25 *LHK Nominees v Kenworthy* (2002) 26 WAR 517; [2002] WASCA 291; BC200206314.

26 Wallwork J (dissenting) in *LHK Nominees v Kenworthy* (2002) 26 WAR 517; [2002] WASCA 291; BC200206314.

27 Ashley AJA (dissenting) in *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133.

28 These arguments have been considered in a number of contexts. For example in relation to mistake and indefeasibility, see L Griggs, 'Indefeasibility and Mistake — the utilitarianism of Torrens' (2003) *APLJ Lexis* 23; and in relation to restitution and indefeasibility, specifically after reversal of a judgment see S Christensen and B Duncan, 'Is Indefeasibility of Title a Bar to Restitution after Reversal of a Judgment on Appeal' (2005) 11 *APLJ Lexis* 1.

29 (2007) 230 CLR 89; 236 ALR 209; [2007] HCA 22; BC200703851.

borrowed by the joint venture and secured by way of mortgage. Upon completion, Say-Dee was to have first priority to have the \$225,000 repaid, second priority was to repay agent and legal fees, with the balance to be distributed equally between the two joint venture partners. Farah Elias was to manage the development application, construction and sale. After the units were purchased, Farah Elias lodged a development application with the council for an eight-storey mixed commercial and residential development. This raised a number of concerns with the council (principally about the height of the development and lack of car parking), with the council suggesting that the proposal was an over-development of a site that was too small and that No 11 should be amalgamated with the adjoining properties to allow the full development potential of the area to be realised. Subsequently, Margaret Elias and the daughters purchased land at numbers 15 as well as 20 Deane Street, with Lesmint Pty Ltd purchasing No 13. The development application was then withdrawn. This saw Farah seek the appointment of a trustee for the sale of the joint venture's land, with Say-Dee countering that a constructive trust should be imposed over the purchases made by Lesmint Pty Ltd, Margaret, Sarah and Jade Elias. Say-Dee submitted that Farah had concealed the council's advice that for the development to succeed the adjoining land should be amalgamated, with the intent that after purchasing the interest of Say-Dee, Farah Constructions would independently proceed with the development. At first instance,<sup>30</sup> Farah was successful in having a trustee appointed to sell the joint venture land. On appeal,<sup>31</sup> the respondent was successful in overturning this decision, with the court holding that even though Margaret, Sarah and Jade Elias had become registered proprietors without any actual knowledge of breach of duty, the knowledge of Farah Elias could be imputed to them, and therefore Mrs Elias and the daughters held the properties on constructive trust for the joint venture. Significantly, the court considered that even if Margaret, Sarah and Jade Elias did not have the requisite knowledge, their title was still defeasible. The law was to be restitutionary in approach, based on unjust enrichment with strict liability sufficing.<sup>32</sup> Unchallenged, this approach would severely undermine indefeasibility, and create a massive expansion in the opportunities for in personam to trump Torrens. Not surprisingly, the matter was appealed to the High Court with Ground of Appeal 9 stating that: 'The Court of Appeal was in error in rejecting (paras 241–243) the defence of the Fourth Fifth and Sixth Appellants based upon section 42 of the Real Property Act.'<sup>33</sup>

30 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2004] NSWSC 800; BC200405608.

31 *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309; BC200507416.

32 In this context, the decision of the NSW Court of Appeal echoes a judgment of the Queensland Court of Appeal in *White v Tomasel* [2004] 2 Qd R 438. In this case, judgment was given in favour of the purchaser of real estate and an order was made for the land to be transferred to the purchaser. Pursuant to the court order, this purchaser was registered and presumably obtained an indefeasible title. The original judgment in favour of the purchaser was subsequently set aside and the vendor then asserted that they were entitled to use in personam to upset the indefeasibility of the purchaser. By a majority, Williams JA and McMurdo J allowed in personam to operate — Davies JA dissented (his Honour considered that the title was indefeasible upon registration and nothing existed to upset that state of affairs).

33 Section 42(1):

### **The High Court judgment in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd***

In upholding the appeal, the High Court was extraordinarily critical of the NSW Court of Appeal. While there was a fiduciary duty to disclose the council's view about amalgamation, and recognising the difficulties in determining this issue given the unreliability of the evidence,<sup>34</sup> Farah had adequately complied.<sup>35</sup> In responding to the question of whether the Court of Appeal was appropriate in reversing the judgment of the Trial Judge, the court stated:

The reasoning of the Court in Appeal — erroneous in parts, exaggerated in other parts, flawed in other ways — does not demonstrate that the trial judge's view, which was, in significant part, demeanour-based, was either glaringly improbable or contrary to compelling inferences. Accordingly the Court of Appeal's finding must be rejected and the trial judge's finding restored.<sup>36</sup>

Furthermore, and more significantly in the context of the current discussion concerning in personam it was a grave error for the court to have held that a constructive trust, (based on unjust enrichment), should have been imposed on Margaret Elias and her daughters, even though they had no knowledge of a breach of duty. This was a fundamental change from the accepted wisdom, and secondly, and perhaps more extraordinarily, had never been argued in the lower courts. Therefore, two reasons existed for why this was such a grave error — first, it was unjust, and second, it caused great confusion.<sup>37</sup> It was unjust as it had never been pleaded by the respondent and never argued by the respondent: 'The relevant part of the Court of Appeal's judgment would have come as a complete surprise to all parties.'<sup>38</sup> In addition, either the Court of Appeal was abandoning the notice test within *Barnes v Addy*, or it was creating a new form of recovery, which sat alongside the principles within *Barnes*.<sup>39</sup> 'In doing so, it was flying in the face not only of the received view of the first limb of *Barnes v Addy*, but also of statements by members of this

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Notwithstanding the existence in any other person of any estate or interest which but for this Act might be held to be paramount or to have priority, the registered proprietor for the time being of any estate or interest in land recorded in a folio of a Register shall, except in case of fraud, hold the same, subject to such other estates and interests and such entries, if any, as are recorded in that folio, but absolutely free from all other estates and interests that are not so recorded except . . .

34 The High Court commented that: 'Neither side could be described as wholly reliable or wholly honest, and none of the judges below did so': (2007) 230 CLR 89; 236 ALR 209; [2007] HCA 22; BC200703851 at [85].

35 'It is true that Farah's disclosures were at different times and in different ways. There was no single occasion on which Mr Elias explained all he knew about the Council's attitudes and why the acquisition of adjoining properties was advantageous in the light of that attitude. But the sufficiency of disclosure can depend on the sophistication and intelligence of the persons to whom disclosure must be made . . . The principals of Say-Dee had much business experience and intelligence . . . As counsel for the appellants said, they were "not babes in the woods"': (2007) 230 CLR 89; 236 ALR 209; [2007] HCA 22; BC200703851 at [107]–[108].

36 (2007) 230 CLR 89; 236 ALR 209; [2007] HCA 22; BC200703851 at [99].

37 Ibid, at [131].

38 Ibid, at [132].

39 Ibid, at [134].

court in *Consul Developments Pty Ltd v DPC Estates Pty Ltd*.<sup>40</sup> In this High Court's view, there is only one common law of Australia, and state jurisdictions needed to be mindful of this.<sup>41</sup> The cases and reasoning adopted by the Court of Appeal in abandoning fault-based liability did not support their conclusions: '[They] were arrived at without notice to the parties, [were] unsupported by authority and flew in the face of seriously considered dicta uttered by a majority of this court. They must be rejected.'<sup>42</sup> Similarly, Margaret, Sarah and Jade Elias were not liable under the second limb of *Barnes v Addy* (knowing assistance): '[There is] nothing to show that Mrs Elias and her daughters had 'consciousness of those elements which make participation transgress ordinary standards of honest behaviour.'<sup>43</sup>

Having firmly rejected the extension sought by the NSW Court of Appeal to *Barnes v Addy*, the next issue was peculiarly land based. Were Margaret, Sarah and Jade Elias entitled to indefeasibility, a point not addressed in any depth at the lower levels? The Court of Appeal had ruled that the constructive trust operated to override indefeasibility. The High Court, without any significant analysis,<sup>44</sup> was quick to dismiss the idea perpetrated by *Tara Shire Council* and the NSW Court of Appeal in the instant matter that *Barnes v Addy* could be used to undermine indefeasibility. The reasoning of those cases where the High Court had routinely provided for the constructive trust remedy in respect of Torrens land<sup>45</sup> had no application where the defendant is not the primary wrongdoer. They could not be applied where the allegation is merely that a person has notice of an interest or fraud. Without any further consideration, the court concluded: 'There is no analogy between the constructive trusts involved in those cases and that which can arise from the application of the first limb of *Barnes v Addy*.'<sup>46</sup> The NSW Court of Appeal ought to have followed *Macquarie Bank v Sixty-Fourth Throne Pty Ltd* and *LHK Nominees Pty Ltd v Kenworthy*.<sup>47</sup>

### In summary

The High Court, though not with any detailed critique, has, with a blunt riposte to the NSW Court of Appeal rejected the application of *Barnes v Addy*

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40 Ibid, at [134].

41 Ibid, at [135].

42 Ibid, at [158].

43 Ibid, at [165].

44 For a detailed and contrasting consideration of the role of restitution in indefeasibility disputes, see R Chambers, 'Indefeasible Title as a Bar to a Claim for Restitution' (1998) *Restitution Law Review* 126.

45 Such as in *Bahr v Nicolay (No 2)* (1988) 164 CLR 604; 78 ALR 1; 62 ALJR 268, *Muschinski v Dodds* (1985) 160 CLR 583; 62 ALR 429; 60 ALJR 52 and *Baumgartner v Baumgartner* (1987) 164 CLR 137; 76 ALR 75; 62 ALJR 29.

46 (2007) 230 CLR 89; 236 ALR 209; [2007] HCA 22; BC200703851 at [195].

47 Ibid, at [196]. Interestingly, the court also suggested that the registered proprietors would prevail over Say-Dee even if they were volunteers: *ibid*, at [198]. However, apart from this statement there was no discussion of the competing authorities on this point. For example, see *Bogdanovic v Koteff* (1988) 12 NSWLR 472 at 480 per Priestley JA (Hope and Samuel JJA agreeing at 473); *King v Smail* [1958] VR 273; *Rasmussen v Rasmussen*; *Valoutin Pty Ltd v Furst* (1998) 154 ALR 119; *Conlan v Registrar of Titles* (2001) 24 WAR 299 at [200] per Owen J.

principles as a method by which indefeasibility should be undermined. I have suggested elsewhere that this is appropriate.<sup>48</sup> What this case does illustrate however, is the need for further development towards harmonisation of the Torrens system. The one common law mentioned by the High Court in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*<sup>49</sup> is reliant on litigants with the advice and finance to be able to take these matters through to the highest judicial body. It is suggested that it would be more appropriate for the policy makers to form and fund a working party to seek a national solution to the substantive principles that govern land registration. As noted at the outset the topic is too critical, too fundamental and too important to have decisions made based on locality. While this fact may decide the economic value of real estate, the substantive law of land law should not be driven by the same values.

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48 L Griggs, 'In Personam, Garcia v NAB and the Torrens System — are they reconcilable' (2001) 1 *QUTLJ* 76. See also M Weir, 'An Australian View: the Queensland Land Title Act' in D Grinlinton, *Torrens in the Twenty-first Century*, LexisNexis, New Zealand, 2003, p 307; J Moore, 'Equity, Restitution and I personam Claims under the Torrens System' (1998) 72 *ALJ* 258 (part 1); (1999) 73 *ALJ* 712 (part 2).

49 (2007) 230 *CLR* 89; 236 *ALR* 209; [2007] *HCA* 22; BC200703851 at [135].



## Case Notes

### To and from — but not across: the High Court — easements, Torrens and doctrinal purity

Lynden Griggs\*

*This casenote examines the recent High Court decision in **Westfield Management v Perpetual Trustee Company**. The High Court, which, in upholding the interpretation given to the easement by the earlier NSW Court of Appeal decision, but which differed from the Trial Judge highlighted two important points. First, purchasers of land will need to seek exceptional legal advice in determining the meaning of an easement prior to settlement. Second, the High Court reinforced the role that Torrens system's ideals will have in interpreting matters that have as their subject matter, registered land.*

#### Introduction

It is generally accepted that when an easement is created over land in favour of a dominant tenement that cannot be extended to benefit other land owned by the dominant owner. To do so would go beyond the purpose for which the easement was created.<sup>1</sup> However, while this may be the norm, (with this point accepted by the High Court in *Westfield Management v Perpetual Trustee Company*)<sup>2</sup> this normality may well be altered or upset by the terms of the easement itself or the context in which it was granted.<sup>3</sup> However, what *Westfield* has done, is clearly limit, specifically in relation to Torrens land, the circumstances in which the exceptions (if so properly called) will apply.

#### Facts of *Westfield Management Ltd v Perpetual Trustee Co Ltd*

The registered proprietor of the servient tenement (Glasshouse) was Perpetual. Westfield was the present registered proprietor of the dominant tenement (known as Skygarden). These two parties were successors in title to the original property owners. The land in question is some of the most valuable commercial land in Australia — frontages onto the Sydney Pitt Street Mall. The mall was created in 1987, the same time as the Glasshouse development (with this fronting the mall as well as King Street). Skygarden was adjacent to Glasshouse and abutted the Pitt Street Mall. There is no vehicular access

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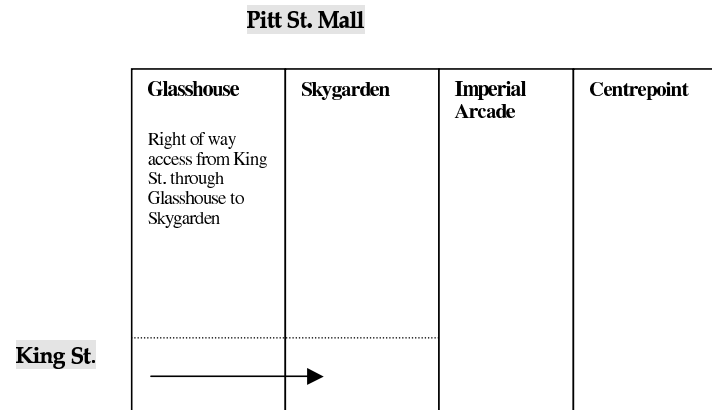
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1 *Harris v Flower* (1904) 74 LJ Ch 127; P Butt, *Land Law*, 5th ed, Thomson LawBook Co, Sydney, 2006, at [1698].

2 (2007) 239 ALR 75; 81 ALJR 1887; HCA 45; BC200708402 at [27].

3 Butt, above n 1, at [1698].

from the mall which necessitated right of way access from the King Street entrance of Glasshouse to Skygarden. Subsequent to its purchase of Skygarden, Westfield had acquired the two adjoining properties — these were known as Imperial Arcade (which adjoined Skygarden) and Centrepont (which adjoined Imperial Arcade). These facts can be represented as follows:



At the time of the easements creation, all four properties were in different ownership. Westfield now wishes to redevelop the properties that it owns and to enable that to happen wants to use the vehicular access easement from King Street through Glasshouse and Skygarden to enter Imperial Arcade and Centrepont. Specifically it sought a declaration that the easement allowed Westfield to continue under Skygarden to access driveways, parking spaces and loading bays to be built on Imperial Arcade and Centrepont. This argument was accepted by the Trial Judge,<sup>4</sup> overturned by the Court of Appeal,<sup>5</sup> with the High Court unanimously and jointly dismissing the appeal of Westfield.

### The terms of the easement

The opening words of the easement were as follows:

*Full and free right of carriageway for the grantee its successors in title and registered proprietors for the time being of an estate or interest in possession of the land herein indicated as the lots benefited or any part thereof with which the rights shall be capable of enjoyment and every person authorised by it, to go, pass and repass at all times and for all purposes with vehicles to and from the said lots benefited or any such part thereof across the lots burdened.*<sup>6</sup>

This was supplanted by a number of conditions set out in the instrument creating the easement. For example the grantor and grantee were liable to share the cost of repairing and maintaining the carriageway, with no obligation

<sup>4</sup> (2006) NSW ConvR 56-163; [2006] NSWSC 716; BC200605443.

<sup>5</sup> (2006) 12 BPR 23,793.

<sup>6</sup> Extracted from the High Court's judgment: (2007) 239 ALR 75; 81 ALJR 1887; HCA 45; BC200708402 at [15] (emphasis supplied by High Court).



for a greater contribution from the owners of the dominant tenement, or for any contribution from the owners of Imperial Arcade or Centrepont (assuming they had been in ownership of someone other than the dominant tenement).<sup>7</sup> Similarly, it was only the grantor and grantee that were liable to keep insured the right of way with the grantee liable to indemnify the grantor for any liability as a result of the acts of the grantee's agents or servants.

### **The existing law on the right to access more remote properties from a dominant tenement**

Often stated as the rule in *Harris v Flower*,<sup>8</sup> the principle is expressed as follows: 'If a right of way be granted for the enjoyment of [title] A, the grantee, because he owns or acquires [title] B, cannot use the way in substance for passing over [title] A to [title] B.'<sup>9</sup> The High Court in *Westfield* accepted this as the opening point of analysis.<sup>10</sup> However, the High Court was also careful to reiterate that, in their view, this principle should not be elevated to a 'rule':

[Their Honours comment] it is important to remark that care certainly must be taken lest the [the principle from *Harris v Flower*] set out above be elevated to the status of a 'rule', whether of construction or substantive law. What the statement does provide is a starting point for consideration of the terms of any particular grant. The statement is consistent with an understanding that the broader the right of access to the dominant tenement granted by the easement, the greater the burden upon the proprietary rights in the servient tenement.<sup>11</sup>

This cautious, perhaps querying approach of the High Court accords with the imperfect precedent supporting *Harris v Flower*. As noted by Paton and Seabourne,<sup>12</sup> the decision itself has a flawed pedigree, with the decision '[resting] heavily on questionable readings of older law reports',<sup>13</sup> and the authorities inconsistent and inconclusive.<sup>14</sup> This of course only begs the more fundamental question: Is there a principled justification for the rule, principle or starting point, (whatever it may be called) irrespective of, and exclusive to, the contradictory authorities? To answer this it is suggested that the genesis for any property law doctrine must begin with the need for certainty, stability and security associated with land ownership. An unstable property market (with the adverse consequences arguably heightened in the commercial real estate

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7 Ibid, at [31], this clause read:

The cost of repair of damage caused to the site of the carriageway (including all structures, equipment, fixtures and fittings erected or positioned on or over the boundaries of the carriageway which boundaries are shown in the above mentioned plan) by the grantor or grantee, their respective servants or agents shall be borne by such grantor or grantee provided however that in any other case the cost of repair shall be borne equally between the grantor and grantee.

8 (1904) 74 LJ Ch 127.

9 Ibid, at 132.

10 (2007) 239 ALR 75; 81 ALJR 1887; HCA 45; BC200708402 at [27].

11 Ibid, at [29].

12 E Paton and G Seabourne, 'Can't get there from here? Permissible use of Easements after Das' (2003) *Conveyancer and Property Lawyer* 127 at 130.

13 Ibid, p 130.

14 Ibid, p 131

market) can only lead to decreased property investment. Owners of land demand security of tenure. There is a normative expectation that investment in real estate will lead to positive inputs into the land itself with security of tenure allowing for the elimination, or at the least the reduction of, 'moral hazards and adverse selection in the credit market'.<sup>15</sup> With stability, an active, vigorous and spirited land market is advanced with certainty, constancy and liquidity improved. As Rose comments:

Economic thinkers have been telling us for at least two centuries that the more important a given kind of thing becomes for us, the more likely we are to have these hard-edged rules to manage it. We draw these ever-sharper lines around our entitlements so that we know who has what, and so that we can trade instead of getting into the confusions and disputes that would only escalate as the goods in question became scarcer and more highly valued.<sup>16</sup>

Does the principle of *Harris v Flower* provide certainty and stability? It certainly fits with the parameters associated with the traditional requirements of an easement. With private easements not existing 'in gross',<sup>17</sup> and the need for the easement to accommodate the dominant tenement,<sup>18</sup> easements conferring advantages on contiguous land will rarely, if ever be accepted.<sup>19</sup> Imprecise or vague easements will also be struck down.<sup>20</sup> The result of this analysis is that easements allowing the dominant tenement to access the servient tenement for the purposes of moving onto further land will rarely be permissible. If this strictness is accepted, the importance of careful drafting of easements cannot be overstated, with this only amplified in the context of Torrens land where material outside of the register as an aid to interpretation will rarely, if ever be accepted. To this end, the High Court in *Westfield* expressly disagreed with its earlier view that extrinsic evidence could be used in determining the extent of a Torrens easement. In their view it is inappropriate to allow the extrinsic material available for use in construing an old system title easement to be adopted in respect of Torrens title.<sup>21</sup>

15 J M Ngugi, 'Re-examining the Role of Private Property in the Market Democracies: Problematic Ideological Issues Raised by Land Registration' (2004) 25 *Mich J Int'l* 467 at 498.

16 C Rose, 'Crystals and Mud in Property Law' (1988) 40 *Stanford L Rev* 577 at 577–8.

17 *Conrad Municipal District v Coles* (1906) 3 CLR 96 at 104–5.

18 *Hill v Tupper* (1863) 2 H & C 121 at 127.

19 One possibility where it will be allowed is where the use of the non-dominant land is ancillary to the use of the dominant land. See, eg, *Shean Pty Ltd v Owners of Corinne Court 290 Stirling Street Perth, Strata Plan 12821* (2001) 25 WAR 65; *National Trust v White* [1987] 1 WLR 907. This latter case was distinguished by the High Court in *Westfield* (2007) 239 ALR 75; 81 ALJR 1887; HCA 45; BC200708402 at [23], where the court said that it was not necessary for those using the access to Skygarden to be at liberty to pass beyond Skygarden to Imperial Arcade and Centrepoint.

20 *Re Ellenborough Park* [1956] Ch 131 at 164: 'The cognate questions involved under this condition are: whether the rights purported to be given are expressed in terms of too wide and vague a character ...'.

21 (2007) 239 ALR 75; 81 ALJR 1887; HCA 45; BC200708402 at [39]:

The statement by McHugh J in *Gallagher v Rainbow* [(1994) 179 CLR 624 at 639–40] that 'the principles of construction that have been adopted in respect of the grant of an easement at common law ... are equally applicable to the grant of an easement in respect of land under the Torrens system', is too widely expressed. The third party who inspects the Register cannot be expected, consistently with the scheme of the Torrens system, to

This strictness alleged clarity and transparency associated with such an immutable position recognised by Paton and Seabourne:

If the rule [in *Harris v Flower*] is to be justified purely on grounds of doctrinal 'neatness', then it must be recognised that its application, and the concept of 'bona fide' or 'colourable' use of a right of way for a particular purpose, produces some odd doctrinal consequences. It introduces something like 'guilt by intention' to the law of trespass in this area. Conduct which externally is wholly consistent with the lawful exercise of the right of way to [the dominant tenement] . . . is made unlawful by the presence of an intention to carry on through A to B, land in which the servient owner has no legal or practical interest.<sup>22</sup>

With this in mind, these authors<sup>23</sup> criticise the traditional position as being unnecessary. Servient owners will be protected by the judge made law associated with excessive use<sup>24</sup> of easements and the requirement that connection to the original lands be somehow connected to the easements association with the dominant tenement. In their view, the law is not advanced any further by maintaining the principle of *Harris v Flower* 'for the sake of doctrinal purity'.<sup>25</sup> Obviously, this view is not shared by their Honours on the High Court, nor it is shared by this author, who considers that the foundation principles of Torrens legislation, and the need to precisely attach interests in land to specified parcels outweighs any basis on which the law should be relaxed.

### **The decision of the High Court in *Westfield Management Ltd v Perpetual Trustee Co Ltd***

The High Court's decision was based on two grounds. The first ground was the wording used in the easement with the starting point for this analysis emanating from the principles in *Harris v Flower*; the second, the aims of the Torrens system. Having accepted that in general a right of way can only be used to access the dominant tenement, the court adopting the accepted principle of *Harris*,<sup>26</sup> the question became one of construction. First, the terms of the easement spoke of 'to and from' the dominant tenements, and not

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look further for extrinsic material which might establish facts or circumstances existing at the time of the creation of the registered dealing and placing the third party (or any court later seized of a dispute) in the situation of the grantee.

22 Paton and Seabourne, above n 12, p 132.

23 Ibid, pp 132–5.

24 See, eg, *Shean Pty Ltd v Owners of Corinne Court 290 Stirling Steet Perth, Strata Plan 12821* (2001) 25 WAR 65; *Graham v Philcox* [1984] QB 747; [1984] 2 All ER 643.

25 Paton and Seabourne, above n 12, p 134.

26 (2007) 239 ALR 75; 81 ALJR 1887; HCA 45; BC200708402 at [27]:

In *Harris v Flower & Sons* the excessive user by which it was attempted to impose an additional burden on the servient tenement consisted in the use of right of way for obtaining access to buildings erected partly on the land to which the right of way was appurtenant and partly on the other land. A claim was put forward on behalf of the plaintiffs that the right of way had been abandoned, on the ground that, as it was practically impossible to separate the lawful from the excessive user, the right of way could not be used at all. This contention failed, however, the court holding that there had been no abandonment, but that the user of the way for access to the buildings so far as they were situate upon land to which the right was not appurtenant was in excess of the rights of the defendants, and a declaration was made accordingly, with liberty to apply.

‘across’ the dominant tenement. This according to the court was an indication that the purpose of the easement was designed to access to and from the dominant tenement. There was no indication within the terms of the easement there should be access to further land reached only by going across the dominant tenement. If this was intended then the phrase ‘and across’ would be added to the easement.<sup>27</sup> This wording of the easement allowed for ancillary uses of adjoining land to be supported by the easement enjoyed by the dominant tenement,<sup>28</sup> but this was constrained by the High Court — ancillary required that the use be *necessary* for the enjoyment of the rights on the dominant tenement.<sup>29</sup>

Additional bases for construing the easement in such a restrictive sense rested on the additional conditions such as the repair clause and the insurance and indemnity clauses. According to the High Court it would be ‘unduly burdensome’<sup>30</sup> for the costs of repair to be shared between the owners of Glasshouse and Skygarden with no possibility of contribution from those who were utilising the access to get to Imperial Arcade or Centrepont. Similarly, if Skygarden was permitted to allow access to Imperial Arcade and/or Centrepont, but without any obligation on those to contribute to insurance or keep indemnified Glasshouse, the situation would be atypical.<sup>31</sup> These considerations supported the conventional reading of the easement, supported by a routine consideration of the characteristics of easements.

### The aims of the Torrens system

Whereas the lower courts had engaged in detailed consideration and discussion of the use of extrinsic material to aid in the construction of the easement, the High Court was far blunter in its analysis. Their Honours considered that such an examination disguised the more fundamental matter. The Torrens system of title registration, its bedrock of indefeasibility and its publicly available register all led to the conclusion that materials and matter available to third parties and not disclosed on the title could not be used in the discovering what was intended by the original parties to the creation of the

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27 *Westfield Management Ltd v Perpetual Trustee Co Ltd* (2007) 239 ALR 75; 81 ALJR 1887; HCA 45; BC200708402 at [18], quoting from Hodgson JA in the Court of Appeal decision *Westfield Management Ltd v Perpetual Trustee Company Law* [2006] NSWCA 245; BC200607053: ‘Certainly, if it had been intended that the grant extended to the authorisation of others to go across the dominant tenement to further properties, the words “and across” could readily have been added.’ Furthermore, the phrase within the easement ‘for all purposes’ could not be used as a justification to allow access for the purposes of redevelopment.

28 For example in *National Trust v White* [1987] 1 WLR 907, the use by visitors of an adjoining carpark was an acceptable ancillary use.

29 (2007) 239 ALR 75; 81 ALJR 1887; HCA 45; BC200708402 at [23]. In support of this the High Court referred to the English Court of Appeal decision of *Peacock v Custins* [2001] 2 All ER 827; [2002] 1 WLR 1815 where it was suggested that the owner of the dominant tenement could presumably go from the dominant tenement for a picnic — though not if this was the purpose behind access to the dominant land. Paton and Seabourne, above n 12, p 132 consider that this must mean that only spontaneous picnics (once someone is on the dominant tenement) are allowed.

30 (2007) 239 ALR 75; 81 ALJR 1887; HCA 45; BC200708402 at [32].

31 *Ibid*, at [34].

easement.<sup>32</sup> This was also the tenor of recent High Court decisions concerning Torrens land.<sup>33</sup> Authorities<sup>34</sup> which had supported the use of extrinsic material bore little relevance to the instant matter where the external evidence was being used to show the subjective intentions and expectations or contemplation of the original contracting parties.<sup>35</sup>

### A sidebar

In related litigation,<sup>36</sup> it was argued by Westfield Management that Perpetual Trustee (or its predecessors) had failed to comply with the conditions associated with the development of the Glasshouse site. When granted in 1986, the development consent for Glasshouse included Condition 56. This provided that:

documentary evidence shall be provided, to the satisfaction of the City Solicitor, that the right-of-way currently applicable to the subject property in favour of the adjoining property, [be] extended to cover the right-of-way to the 'Imperial Arcade' site and the 'Centrepont' site, with reciprocal rights where necessary and such rights shall embody a provision ensuring their application in perpetuity, except with the consent of Council.

Westfield sought to enforce Condition 56, Perpetual argued that it was void for uncertainty. While Perpetual was successful at first instance, on appeal the arguments of Westfield were upheld. Condition 56 required Perpetual to take action to extend the easement to Imperial Garden and Centrepont. Perpetual sought leave to appeal this matter to the High Court, with this leave not being granted.<sup>37</sup> Therefore, while Perpetual may have won the main game as far as the easement litigation was concerned, the victory was pyrrhic.

### Conclusion

The High Court in a rare unanimous, and relatively short judgment recommitted to a very traditional position. Despite the millions of dollars in access and redevelopment costs that would have lain behind this litigation, easement and Torrens orthodoxy were such that a clear response and message was required. The necessity for strict identification of the dominant tenement, the faith given to the Torrens register, and the wording of the instrument alone all mandated that the easement be precisely defined according to its terms.

<sup>32</sup> Ibid, at [37]–[39].

<sup>33</sup> For example, *ibid*, at [38], citing *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; 236 ALR 209; [2007] HCA 22; BC200703851; *Black v Garnock* (2007) 237 ALR 1; [2007] HCA 31; BC200705972. This philosophy did not deny that the use of an easement may change with the nature of a dominant tenement — all that is required is that the terms of the easement are sufficiently broad to allow that change to occur: *ibid*, at [43].

<sup>34</sup> *Ibid*, at [40], such as *Overland v Lenehan* (1901) 11 QJL 59; *Powell v Langdon* (1944) 45 SR (NSW) 136.

<sup>35</sup> *Ibid*, at [39]–[45]. An example was given where extrinsic evidence was capable of being used — this was evidence which explains the surveying terms and abbreviations which appear on title plan: at [44].

<sup>36</sup> *Westfield Management Ltd v Perpetual Trustee Company Ltd* [2006] NSWCA 245; BC200607053.

<sup>37</sup> *Westfield Management Ltd v Perpetual Trustee Company Ltd* [2007] HCA Trans 367.

This was not a case where the use of the access was ancillary to the dominant tenement, Westfield were simply seeking to go beyond what was agreed when the easement was created, and which was known to them when they purchased the land. While some may suggest that the principles behind *Harris v Flower* serve no useful purpose, the present system of registered title to land, and the strict canons for the establishment of easements have served the property system relatively well. Any reform should not be piecemeal, but part of a larger package looking at their position within a system regulated by interests based on registration and not on possession.<sup>38</sup>

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<sup>38</sup> It should be noted that the UK Law Reform Commission has recently issued a consultation paper on easements: The Law Commission, Consultation Paper No. 186, *Easements, Covenants and Profits a Prendre*, March 2008, at <<http://www.lawcom.gov.uk/easements.htm>>. The Tasmanian Law Reform Institute is also looking at the topic.



# Resolving the debate surrounding indefeasibility through the eyes of a consumer

Lynden Griggs\*

*From its origins in South Australia, the Torrens system of land registration has become a truly global export. With the notable exception of much of the United States, its reach in the Asia-Pacific region (most notably in the Philippines, Papua New Guinea, Singapore and Malaysia) is extensive. However, despite a broad acknowledgement that indefeasibility is the linchpin of the Torrens system, there is a far less harmonious approach on how this concept should integrate with established property law doctrines. With Australia and New Zealand adopting immediate indefeasibility, other countries have softened the often harsh, immoral nature of this doctrine by preferring to utilise deferred indefeasibility. The debate between deferred and immediate indefeasibility has long raged and a doctrinal remedy appears intractable. The purpose of this article is to see how consumer law may inform the argument. The purchaser of land is no less of a consumer than what we may intuitively associate with this term, and given the higher expense, greater risk and more embedded emotional commitment associated with the purchase of a home, the consumer safeguards are no less deserving of consideration. The suggestion is made that immediate indefeasibility can meet consumer goals, but that greater education is needed to ensure that the fragility associated with title in the Torrens system is understood by its consumers, and that safeguards can be taken to protect against loss associated with the adoption of this doctrine.*

## Introduction

It seems wrong that the coercive power of the state should be used to force an unconsented transfer from A to B where the operation of the open market has failed to generate the required bargain by means of normal arm's length dealing.<sup>1</sup>

It is an old, wise and beneficial presumption, long obeyed, that to take away people's rights, Parliament must use clear language. The basic human right to own property and to be immune from arbitrary dispossession of property is one generally respected by Australian lawmakers.<sup>2</sup>

Land is the ultimate resource.<sup>3</sup> So described by the United Nations Economic Commission for Europe Working Party on Land Administration, that statement crisply notes why an understanding of land, and its

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1 K Gray, 'There's No Place like Home' (2007) 11 *Jnl of South Pacific Law* 73 at 75.

2 *Wilson v Anderson* (2002) 213 CLR 401; 190 ALR 313; [2002] HCA 29; BC200204356 [140].

3 UN Economic Commission for Europe Working Party on Land Administration, *Land Administration Guidelines*, UN ECE/HB/96, New York and Geneva, 1996, p 10.

administration and regulation is critical for modern societies.<sup>4</sup> Despite the importance of land, the study of land administration in a consumer context is relatively rare. This occurs despite the knowledge that for many people the purchase and sale of residential real estate will be the most significant one-off financial transaction that he or she will ever undertake.<sup>5</sup> However, for most Australians that transaction will not be in trade or commerce for the purposes of the 'misleading or deceptive conduct' or the 'false representations and other misleading or offensive conduct in relation to land' sections of the Trade Practices Act 1974 (Cth) or the Fair Trading legislation.<sup>6</sup> Nor will the consumer legislation providing for an implied warranty that the supplier has title apply.<sup>7</sup> However, the lack of applicability of this consumer legislation does not mean that the purchaser or vendor lacks safeguards, merely that these must be found elsewhere. Therefore, in considering the purchase of real estate

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4 As noted by J E Cribbet, 'Concepts in Transition: The Search for a New Definition of Property' (1986) *U Ill L Rev* 1 at 3-4:

Land, including surface, subsurface, air rights, and water rights, represents the basic resource for existence on this planet. In that sense, land is a unique resource and requires special treatment. It is as permanent as anything in an impermanent world. It is immovable yet exhaustible, and we now have as much of this resource as ever will exist. Because land is a closed physical system, its allocation and use are critically important to society.

5 Some indication of this is given by Davison who indicates that over the 20 year period from 1975-1995, the number of times the average male moves in the course of their lifetime rose from 10.4 to 12.8 in that period. Interestingly the author notes that rates of movement are significantly higher in Australia than in Europe or North America: J Davison, Assistant Research Director, Australian Housing and Urban Research Institute, *Housing Policy and residential mobility*, Paper presented to the 2005 National Housing Conference, at <[http://www.nationalhousingconference.org.au/downloads/2005/DayOne/Davison\\_J\\_paper.pdf](http://www.nationalhousingconference.org.au/downloads/2005/DayOne/Davison_J_paper.pdf)> (accessed 27 May 2009).

6 *O'Brien v Smolonogov* (1983) 53 ALR 107; 2 IPR 68; (1983) ATPR 40-418; *Argy v Blunts* (1990) 26 FCR 112; 94 ALR 719; (1990) ATPR 41-015; *Franich v Swannell* (1993) 10 WAR 459. If the transaction is part of a series of transactions, then it may be considered in trade or commerce: *Gentry Bros Pty Ltd v Wilson Brown & Associates Pty Ltd* (1992) 8 ACSR 405; 10 ACLC 1394; (1992) ATPR 41-184. The fair trading legislation for each jurisdiction in Australia is Fair Trading Act 1987 (NSW); Fair Trading Act 1989 (Qld); Fair Trading Act 1987 (SA); Fair Trading Act 1990 (Tas); Fair Trading Act 1999 (Vic); Fair Trading Act 1987 (WA); Fair Trading Act 1992 (ACT); Consumer Affairs and Fair Trading Act 1990 (NT). Interestingly, s 53A(2) provides that a 'corporation shall not use physical force or undue harassment or coercion in connection with the sale or grant, or the possible sale or grant, or an interest in land or the payment for an interest in land'. There is no restriction to trade or commerce.

7 Section 69 of the Trade Practices Act provides that in the case of a sale of goods by a corporation to a consumer, that there is an implied condition that the supplier has the right to sell the goods, there is an implied warranty that the consumer will have undisturbed possession of the goods, and an implied warranty that the goods are free from any encumbrance in favour of any third party of which the buyer is unaware. The equivalent provisions in the Sale of Goods legislation for each state and territory (this legislation extending the operation of this to 'natural persons'): (ACT) s 17; (NT) s 17; (NSW) s 17; (Qld) s 15; (SA) s 12; (Tas) s 17; (WA) s 12; (Vic) Goods Act 1958 s 17). This will generally not apply because, as noted, the legislation is restricted to consumers. Section 4 of the legislation defines 'goods' as follows:

- (a) ships, aircraft and other vehicles;
- (b) animals, including fish;
- (c) minerals, trees and crops, whether on, under or attached to land or not; and
- (d) gas and electricity.



by way of a functional analysis,<sup>8</sup> we see consumer safeguards built into the process of buying property. This includes the use of the competition mantra<sup>9</sup> to deregulate the fees charged by real estate agents and to provide for the registration, rather than licensing, of property agents,<sup>10</sup> together with the mandatory and arguably paternalistic introduction of vendor disclosure. The latter reform required because of the informational failure within the competitive market prevents consumers from appreciating the latent risks involved in house buying.<sup>11</sup> Once the property is located and settlement is required, competition in the conveyancing process is mandated by the removal of any legal profession monopoly,<sup>12</sup> with deregulation of the finance sector as the tool used to minimise the interest rates imposed by the mortgage industry, and to encourage diversity of product. However, one aspect in the conveyancing process has undergone little analysis by way of consumer principles. The matter that has rarely been questioned is the way in which the title (in the sense of 'ownership' as it can exist in a feudal, as against an allodial, system of land ownership)<sup>13</sup> being sold by the vendor is sound and that the purchaser is buying something without impairment, and that once bought the purchaser (now owner) is secure in the knowledge that they will not face peremptory eviction from their house through no fault of their own. The reason for this lack of analysis is, in one sense, understandable. The average family will not purchase a significant number of properties in the cycle of their life. Therefore the purchaser/owner of real estate has little incentive to bring a strong voice to force change, with at present, policy development largely controlled through the institutions<sup>14</sup> of real estate conveyancing, such as lawyers, the courts and the legislature.<sup>15</sup> Today, and

8 See Z O Gresham, 'The Residential Real Estate Transfer Process: A Functional Critique' [1974] 23 *Emory LJ* 421.

9 For the interface between competition and consumer law, see L Sylvan, 'Activating Competition: The consumer — competition interface' (2004) *CCLJ Lexis* 14.

10 As an example of this, see Property Agents and Land Transactions Act 2005 (Tas). Arguably licensing is used to restrict entry into the profession, whereas registration allows any person to enter the industry, provided they have met certain objective criteria (such as the successful completion of a course of study).

11 A number of jurisdictions presently have some system of vendor disclosure. For a discussion of these see Tasmanian Law Reform Institute, *Vendor Disclosure — Final Report*, September 2004, at <<http://www.law.utas.edu.au/reform/>>. Information based remedies are generally preferred because they still leave the ultimate decision in the hands of the consumers: H Beales et al, 'The Efficient Regulation of Consumer Information: A Research Agenda' (1981) 24 *JL & Econ* 491 at 513.

12 As an example of a recent illustration of this, see Conveyancing Act 2004 (Tas).

13 In the context of property law, the reference to 'title' can also mean the way in which the ownership of land is proven, that is, the series of transactions necessary to establish the underlying ownership of the land. The system of land ownership in Australia is feudal. This means that all land is held 'of or from' the Crown. See, generally, M Stuckey, 'Feudalism and Australian Land Law: A "Shadowy, Ghostlike Survival"' (1994) 16 *Uni of Tas L Rev* 102. Allodial title is where the land is not held of or from the Crown. See J Devereux and S Dorsett, 'Towards a Reconsideration of Estates and Tenures' (1996) 4 *APLJ Lexis* 30.

14 For a discussion of the role of institutions in the consumer process, see L Griggs, 'Intervention or empowerment — choosing the consumer law weapon' [2007] *CCLJ Lexis* 2.

15 Traditionally, it has been the policy makers that have sought to control the land transfer system. Early attempts reaching as far back as the time of Henry VIII and Queen Anne. The

apart from much of the United States and some parts of Latin and South America,<sup>16</sup> the Torrens system of land registration, an Australian invention,<sup>17</sup> enjoys global recognition, though the notion of one model is far more ephemeral.<sup>18</sup> There is no doubt that in terms of consumer outcomes, the Torrens system is vastly superior in comparison with old system or general law title, with its reliance on many deeds 'difficult to read, disgusting to touch, and impossible to understand'.<sup>19</sup> As noted by Gresham in describing old system title in the US context:

A system of land rights so dysfunctional for modern conditions is the product of long obsolete historical forces. Because land ownership is feudal times imposed on the freeholder certain duties to the overlord, the rule emerged that a person could not abandon a freehold and thus escape obligations owed to the seigneur. The law forbidding abandonment was extended to virtually all interests inland and continues to stalk the countryside, perpetuating legal interests in real property that are long dead in human contemplation and practice.<sup>20</sup>

Despite the growth or evolution of Torrens into a global industry, and an appreciation that on a consumer basis this system is far superior to old system title, what is not uniformly agreed is how indefeasibility, the underlying concept of Torrens, should be interpreted. For example, Australia and New Zealand have expressly accepted what is known as immediate indefeasibility,

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first foray in the land transfer system involved the notion of feoffment and livery of seisin. The feoffer (or grantor) gave a sod of soil to the feoffee (grantee) with this person then left in possession. See, generally, H W B Mackay, 'Registration of Title to Real Estate' (1897) 11 *Harvard L Rev* 301.

16 J L McCormack, 'Torrens and Recording: Land Title Assurance in the Computer Age' [1992] 18 *William Mitchell L Rev* 61 at 63 n 5 notes that Brazil adopted Torrens in 1890, but that it is little used today, and that the introduction of a Torrens system also failed in parts of Latin America.

17 Though it must be acknowledged that many historians consider that Torrens drew heavily on the Hanseatic system of title registration for shipping: M J Raff, *Private Property and Environmental Responsibility: A Comparative Study of German Real Property Law*, Kluwer Law International, The Hague, 2003, Ch 2; contrast G Taylor, *A Great and Glorious Reformation: Six Early South Australian Legal Innovations*, Wakefield Press, 2005, Ch 2.

18 Torrens can definitively be found in Australia, New Zealand, Malaysia, Singapore and a number of smaller countries in the Pacific region. Many countries will have a land registration system based on title. For an overview of the land administration systems in Europe and North America, see UN ECE Working Party on Land Administration, *Inventory of Land Administration Systems in North America*, 4th ed, HM Land Registry, London, 2005. See also Ausaid, *Improving Access to Land and Enhancing the Security of Land Rights: A Review of Land Titling and Land Administration Projects*, Quality Assurance Series No 20, September 2000 quoted in T Stutt, 'Transitions to Torrens: The six-fold path to the ideal land administration system?' (2008) 15 *APLJ Lexis* 1 at 34 of online version. An interesting absence from the list of countries who have adopted title by registration systems is the United States. For some discussion of the reasons for this, see C A Yzenbaard, 'The Consumer's Need for Title Registration' (1977) 4 *Northern Kentucky LR* 253.

19 *Wroth v Tyler* [1974] Ch 30 at 56; [1973] 1 All ER 897; [1973] 2 WLR 405. Under the old system of land registration, where title was established by the chain of transactions, defects would not be revealed if, for example, a document had been deliberately removed (legal interests still prevailed against the purchaser); the conveyance by the vendor twice (eg, *Pilcher v Rawlins* (1872) 7 Ch App 259); possessory interests may not be revealed; the failure of a document to operate according to what it said (eg, non est factum). Under the doctrine of merger, a purchaser delivered a defective title cannot sue the vendor: *Pallos v Munro* (1970) 72 SR(NSW) 507.

20 Gresham, above n 8, at 446.

yet most other nation states, if not the majority, would have adopted a concept of indefeasibility either that is deferred, or which modifies immediate indefeasibility. The purpose of this article is to consider this bifurcation and analyse how consumer law can inform the debate as well as provide a practical measure that can easily be adopted to match consumer expectations with the legal framework. In doing this, the first part of this article will briefly outline the expectations of a consumer in a land transaction as well as provide a primer of the Torrens system. Indefeasibility is then examined, with this followed by a consideration of how consumer law may resolve the current confusion that presently exists between nation states as to its application. The importance of this cannot be underestimated. Immediate indefeasibility can operate to remove, almost imperiously, what many would perceive to be the rightful owner from their land — an ejection which, as the opening two quotes presage, should rarely occur. If this does not meet consumer expectations, then how do the institutions that develop policy within this area respond? Should, in this country at least, the progeny sired from the acceptance of immediate indefeasibility be relegated to the teachings of legal history?

### **What are the expectations of an owner and purchaser of real estate?**

To this end, the expectations of the owner/purchaser of residential real estate are simple. A land registration system should provide for security of title, be simple, accurate and cheap.<sup>21</sup> '[T]he avoidance of unnecessary doubt and confusion is a proper objective of land law.'<sup>22</sup> The owner should be confident that he or she will receive title to the land that will correspond with their reasonable expectations, that they will not be evicted or removed from their property without their consent, and that the land will not be taken away except in accordance with what could be considered ex-ante objectively justifiable community expectations.<sup>23</sup> The homebuyer will also expect that the title he or she will receive will be free from defect.<sup>24</sup> In this context, title means that the land is free of any encumbrance, lien, right or other interest that would make the land unmarketable. It does not mean that the land has an economic value.

### **A primer on the Torrens system**

Two key features underlie the Torrens system. The first is that each land parcel will be identified and the second and more important feature for immediate

21 These are four of the six criteria identified in 1913 by Brickdale, Sir C F Brickdale, 'Methods of land transfer, being eight lectures delivered at the London School of Economics, in the months of May and June, 1913' (1914) *The Making of Modern Law* 2. The remaining two criteria were expedition and suitability to circumstances. See also, Yzenbaard, above n 18, at 254.

22 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 221 per Kirby J; 141 ALR 129; [1996] HCA 40; BC9606282.

23 An example might be the seizure of property under the Bankruptcy Act 1966 (Cth).

24 The law has considerable difficulty in determining what constitutes a defect in title allowing a person to rescind, and what constitutes a mere defect in the quality of title for which rescission is not permissible. See generally D Skapinker, 'A Different Perspective on defects in title and quality' (1994) 2 *APLJ* 231. See also *Carpenter v McGrath* (1996) 40 NSWLR 39; (1996) NSW ConvR 55-788; BC9604107 where Cole JA discusses the extent to which the erection of a building structure without council approval will amount to a defect in title.

purposes is that any interests or estates relevant to the title are recorded on a public register maintained by the state. By contrast to the general law system, which involved the registration of the instruments describing title, the Torrens system register is conclusive evidence of the rights themselves. In some jurisdictions, but not all, this statement by the state is backed by an insurance or assurance fund that compensates those who have been harmed by the operation of the Torrens system. The result of this structure is that every time there is a sale of land the title is relinquished, and taken back by the Crown. The Crown then issues a new title to the purchaser. Title is not derivative and should reflect (as in a mirror or photo) the encumbrances and interests relevant to that title. It is a positive system whereby the:

state warrants that the rights shown on the register are valid and effective according to their terms. This is an authoritative system, a 'register of conclusions', which allows purchasers to transact safely in reliance on the registered title even if it turns out to have been procured by defective means. In a 'negative system', registration does not confer or guarantee title, with the result that purchasers must examine the deeds and draw their own conclusions.<sup>25</sup>

Torrens has also been described as 'bijural in the way that it interacts with the established and evolving rules of property law'.<sup>26</sup> Bijuralism is at the heart of the instant debate. On the one hand, it might be said that the established rules of property law were designed to interact with this new system of land administration and title by registration and was never meant to codify the principles governing how a proprietary interest in land was to be obtained. Conversely, it might be suggested that the arguable paramountcy provided by indefeasibility was intended and directly aimed to quash the festering complexity and incoherency inherent in old system title. In making this latter submission, it must always be appreciated that total indefeasibility is largely unattainable. Every successive indefeasible title will, by registration, destroy the previously protected title. 'Indefeasibility is a shield which will ward off most attacks on title, but which will be pierced, with fatal results to the title it guards, by the sword of a later indefeasible title.'<sup>27</sup> It is this aspect where the commonly understood expectations of the owner would not meet the legal framework. Apart from those within the academy or in legal practice, few would appreciate the tenuous nature of one's title when attacked by a subsequent purchaser acting innocently and in reliance on the tenure derived from the Crown. Like the thread that held the sword under which Damocles sat, indefeasibility will remain inviolate until swiftly cut by the later operation of the register. Once cut, the head of Damocles, or in our context, the title of the registered proprietor, is forever maimed and left lifeless as an historical incident.

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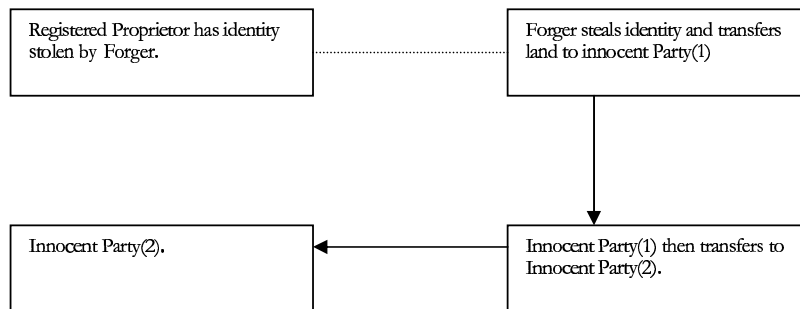
25 P O'Connor, 'Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Title Systems' (2009) 13 *Edinburgh L Rev* 194 at 195.

26 *Ibid.*, at 195.

27 D J Whalan, *The Torrens System in Australia*, LawBook Co, Sydney, 1982, p 297.

### Indefeasibility — the core concept of Torrens

Once registered, the registered proprietor gains an indefeasible title to that land, subject only to such estates and interests as are recorded on title.<sup>28</sup> Title cannot be set aside because of some defect in the period leading to registration. It is the ‘foundation of the Torrens system’.<sup>29</sup> It is, however, not an absolute or indisputable concept, and indisputably is a principle, ‘apt to create unfairness’.<sup>30</sup> Broadly speaking, two theories of indefeasibility exist, immediate and deferred, with the difference being as follows. With immediate indefeasibility, registration will cure any defect that may have existed in the registered proprietor’s title. This contrasts with old system title where the process of registration of title will not cure the impediment. By contrast, deferred indefeasibility operates so that registration will not cure any problem that results from a void or voidable instrument — indefeasibility is deferred to the next registered proprietor.<sup>31</sup> Immediate indefeasibility works to protect the security of the transaction (ie, the purchaser), whereas deferred, at least initially, guards against loss of the assets being held (ie, the owner is favoured). The differences can be illustrated as follows:



Under old system title, the Registered Proprietor would retain the title to the land. Under immediate indefeasibility, Innocent Party(1) would obtain an indefeasible title, as would Innocent Party(2) when the title was transferred to that person. Under deferred indefeasibility, Innocent Party(1)'s title would be defeasible, and an indefeasible title would only be obtained upon a transfer from Innocent Party(1) to Innocent Party(2).

Figure 1

These principles compete. Immediate indefeasibility favours the buyer of the land. It gives effect to the commercial transaction without consideration of whether that transaction would sit easily with established property law doctrines. However, once bought, immediate indefeasibility leaves the now

28 The indefeasibility provisions of the legislation are as follows: Transfer of Land Act (Vic) 1958 s 42; Land Titles Act 1925 (ACT) s 58; Real Property Act (NSW) 1900 s 42; Real Property Act (NT) s 69; Land Title Act 1994 (Qld) s 184; Real Property Act (SA) s 69; Land Titles Act 1980 (Tas) s 40; Transfer of Land Act 1893 (WA) s 68.

29 *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at 613; 78 ALR 1; [1988] HCA 16; BC8802595.

30 *Perpetual Trustees Victoria Ltd v English* [2009] NSWSC 478; BC200904808 at [156].

31 See P Butt, *Land Law*, 5th ed, Thomson Lawbook Co, Pyrmont, 2006, pp 726–8.

homeowner in a precarious position. Their title is now subject to an option — an option that if a later innocent party becomes registered, their home ownership in that land will be brutally and harshly expunged. While in Australia, this loss of land will be compensated in financial terms, in some jurisdictions (eg, Malaysia), state compensation is not available:

In this terminology there is ‘static’ security to the extent that the law prevents deprivation of property other than by consensual transfer, and there is ‘dynamic’ security (or security of transaction) to the extent that the law upholds the expectation that bona fide purchasers will acquire a good title to an asset, free of unknown claims. Static security allows assets to be securely held, while dynamic security allows assets to pass securely to new owners. The dilemma is that while both conceptions of security are desirable, they are to some extent antithetical. Rules that promote static security tend to derogate from static security and vice versa.<sup>32</sup>

In Australia and New Zealand, the strength of immediate indefeasibility is apparent. The High Court in *Breskvar v Wall*,<sup>33</sup> in following the Privy Council authority, on appeal from New Zealand of *Frazer v Walker*,<sup>34</sup> expressly endorsed this concept with later authorities building on this infrastructure of immediate indefeasibility, so that in this jurisdiction at least, it has largely become insurmountable.<sup>35</sup> Whereas the Torrens system has largely enjoyed successful adoption, immediate indefeasibility has not attracted the same level of support. For example, in Malaysia and some provinces of Canada deferred indefeasibility is arguably the norm,<sup>36</sup> with the jurisdictional differences stemming from how the purpose of the legislation is to be read. For example, Barwick CJ’s statement in *Breskvar v Wall* is emblematic of the Australian position.<sup>37</sup> In the High Court’s view, the Torrens system was not a natural evolution from old system title, but an unprecedented and uncompromising attack on the precepts underlying its basis. The extreme position was to be adopted thus fulfilling the promise of a slate wiped clean and replaced by a system distinct in every respect from what it replaced. Notice of prior interests was no longer relevant,<sup>38</sup> nor was there any need to undertake an historical examination of the derivation of title. It is a view endorsed recently by the

32 O’Connor, above n 25, at 198.

33 [1971] 126 CLR 376; [1972] ALR 205; (1971) 46 ALJR 68; BC7100630.

34 [1967] 1 AC 569; [1967] NZLR 1069; [1967] 1 All ER 649; [1967] 2 WLR 411.

35 See Butt, above n 31, p 728 for a discussion of these authorities. ‘So it can now confidently be said that immediate indefeasibility is the preferred doctrine throughout Australia.’

36 See Butt, above n 31, p 728 n 85. Contrast O’Connor, above n 25, pp 208–21.

37 *Breskvar v Wall* (1971) 126 CLR 376 at 385–6; [1972] ALR 205; (1971) 46 ALJR 68; BC7100630:

The Torrens system or registered title of which the Act is a form is not a system of registration of title but a system of title by registration . . . The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor. Consequently, a registration which results from a void instrument is effective according to the terms of the registration.

38 See Land Titles Act 1925 (ACT) s 59; Land Title Act 2000 (NT) s 188; Land Title Act 1994 (Qld) s 184; Real Property Act 1886 (SA) ss 72, 186–187; Land Titles Act 1980 (Tas) s 41; Transfer of Land Act 1958 (Vic) s 43; Transfer of Land Act 1893 (WA) s 134; Real Property Act 1900 (NSW) ss 43 and 43A.

High Court.<sup>39</sup> By contrast to this approach, other jurisdictions have chosen to interpret their own legislation as subject to common law principles with nations such as Canada and Malaysia interpreting the system as merely a complement to the established common law principles, with deferred indefeasibility the only mechanism to provide this conflation.<sup>40</sup> For example, in the Malaysian authority of *Macnamara v Kuan*,<sup>41</sup> the plaintiff, an Australian, and the defendant were married in 1997, with this marriage registered in 1999. They divorced some 5 years later. In 1999, Macnamara had solely financed the purchase of a property at Canning Garden, Perak with this property being placed in the name of Kuan. A trust deed established at this time indicated that the plaintiff had solely provided the finance, and that as consent was required for a purchase of Malaysian property by a person not of Malaysian nationality, the defendant would hold the property in trust for her husband until this consent was obtained. The deed further provided that once the consent was obtained, the defendant would deal with the property as directed by Macnamara. When the relationship broke down, the defendant, in separate family law proceedings, obtained an order preventing the plaintiff from entering the property. Macnamara sought a judicial decree that the trust be upheld and that he be entitled to vacant possession of the property. In respect of indefeasibility, the defendant argued that her title to the property was indefeasible. However, Balia Yusof J was quick to dismiss this argument. His Honour comments:

It should be noted that the expansion of [in personam] has been prominent in the Australian system of registration of titles where the principle of immediate indefeasibility applies . . . Where the system of registration of titles is one of deferred indefeasibility . . . as it is in Malaysia . . . there is no real barrier in principle to a generous application of equity subject to the provisions of the National Land Code . . . The existing approach provides the system with a degree of flexibility necessary to meet the demands of a property-owning community. There is sufficient latitude within existing authorities to cater for this development and this is so especially where the nature of the Torrens system in Malaysia provides for deferred rather than immediate indefeasibility.<sup>42</sup>

Accordingly, the plaintiff was entitled to an order for vacant possession.

By contrast to this Malaysian position, Singaporean authorities have endorsed immediate indefeasibility.<sup>43</sup> For example, in *United Overseas Bank Ltd v Bebe Bte Mohammad*<sup>44</sup> in circumstances where a 90-year-old woman suffering from Alzheimers allegedly granted a mortgage over her property to secure credit in favour of her daughter and son-in-law, the court refused to entertain the existence of any personal equity in favour of the registered proprietor. As noted by the Court of Appeal, the 'courts are constantly struggling to find the right balance between the competing considerations of

39 *Farah Constructions v Say-Dee* (2007) 230 CLR 89; 236 ALR 209; [2007] HCA 22; BC200703851.

40 See the discussion of the Canadian position by O'Connor, above n 25, p 213.

41 [2008] 2 MLJ 450.

42 Ibid, at [28], [31].

43 See generally, B Crown, 'Indefeasibility of Title: Developments in Singapore' (2007) 15 *APLJ* 91.

44 [2006] 4 SLR 884.

certainty and fairness'.<sup>45</sup> In deciding in favour of the mortgagee, the court stressed the importance of indefeasibility of title and the paramountcy of the registered title. The policy objectives of the legislation required that certainty prevail and unconscionability should not be used to erode the principle of indefeasibility.<sup>46</sup>

In Canada, the diversity of the Federal system in that state has produced even less cohesion than exists in Australia. The position can be summarised as follows:<sup>47</sup>

Alberta	Immediate Indefeasibility (though not affirmatively decided) <sup>48</sup>
British Columbia	Unsettled <sup>49</sup>
Manitoba	Immediate Indefeasibility (thought not affirmatively decided) <sup>50</sup>
Ontario	Deferred indefeasibility <sup>51</sup>
Saskatchewan	Immediate Indefeasibility <sup>52</sup>

Because of the polar opposition of the two approaches, the judicial response, depending on which principle was adopted, has varied in recognition of a need to modify the harshness of the particular result. For example, in Australia and New Zealand and its recognition of immediate indefeasibility, attempts are routinely made to either extend the operation of the statutory fraud exception to indefeasibility,<sup>53</sup> or to undermine immediate indefeasibility through application of in personam. An illustration of how this can occur dramatically is illustrated in *White v Tomasel*.<sup>54</sup> In this case, a transfer of land resulted from a court order. Subsequently the appeal court set

45 Ibid, at [10].

46 Ibid, at [28], [90], [91], [96].

47 See B Ziff, 'Looking for Mr Wright: A Comment on *Lawrence v Wright*' (2007) 51 *RPR* (4th) 22; O'Connor, above n 25, pp 208–16. For further discussion of the Canadian position, see F Brochu, 'Le système Torrens et la publicité foncière québécoise' (2001–2002) 47 *McGill LJ* 625; R Stein, 'Some Aspects of Title by Registration in the Maritime Provinces of Canada' (1975–1976) 2 *Dalhousie LJ* 633; M Neave, 'Indefeasibility of title in the Canadian Context' (1976) 26 *Uni of Toronto L Jnl* 173.

48 Ziff, above n 47, n 10.

49 Land Title Act RSBC 1996, c 250, s 25.1 as am by SBC 2005, c 35 — noted in Ziff, above n 47, n 11.

50 Private Title Insurance (Manitoba LRC No 114, 2006) 17–18, quoted in O'Connor, above n 25, at 208.

51 *Lawrence v Maple Trust Company* (2007) 84 OR (3d) 94; 278 DLR (4th) 698 at [55]–[57] — deferred indefeasibility was consistent with the wording of the legislation, an historical analysis of the Act and preferable for policy reasons.

52 *Hermanson v Martin* [1987] 1 WWR 439.

53 For example, in *Bank of South Australia v Ferguson* (1998) 192 CLR 248 at 255 it was said, 'Not all species of fraud which will attract equitable remedies will amount to fraud in the statutory sense'; 151 ALR 729; [1998] HCA 12; BC9800309. Similarly, the earlier High Court case of *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at 614 per Mason CJ and Dawson J; 78 ALR 1; [1988] HCA 16; BC8802595, considered that statutory fraud could encompass equitable fraud. New Zealand courts have embraced a wider definition of fraud. See the discussion of this point in *Presbyterian Church (NSW) Property Trust v Scots Church Development Ltd* (2007) 64 ACSR 31; 13 BPR 24,969; [2007] NSWSC 676; BC200705091.

54 [2004] 2 Qd R 438; [2004] ANZ ConvR 248; [2004] QCA 089; BC200401549.



aside that order. However, in the interim, the transfer of land had been registered, and Tomasel, the now registered proprietor, argued that their title was indefeasible. The Queensland Court of Appeal, by a majority, accepted that in personam applied to make Tomasel's title impeachable. This result of a defeasible title was achieved despite no finding of unconscionability by Tomasel.<sup>55</sup> Another possibility to weaken the harsh, blunt nature of immediate indefeasibility has been to suggest that the recorders' powers to intervene to rectify title should be expansively read. This suggestion has not been adopted in Australia,<sup>56</sup> or Singapore,<sup>57</sup> though broader powers of rectification do exist, for example, in the United Kingdom.<sup>58</sup> By contrast, in those jurisdictions where deferred indefeasibility is the norm, courts have sought to engage in a complex analysis of who had the most opportunity to avoid fault and to modify their solution accordingly.<sup>59</sup>

### Do any existing consumer law doctrines help?

Property law principles will not resolve this issue, and continuing debate over the applicability of immediate and deferred indefeasibility only serves to undermine the Torrens system — a system far superior on any level of consumer protection to that which existed in the past. As indicated at the outset, the void in the academic literature is that the issue has not been examined from the substratum of consumer law principles. Can this body of law provide a resolution as to whether immediate or deferred indefeasibility should be adopted? In an era where identity fraud is of increasing community concern,<sup>60</sup> (with this a particular problem associated with the rise of social networking sites), and an estimate that it costs Australians some \$3.5 billion a year,<sup>61</sup> heightened disquiet will continue over the operation of the Torrens

55 The majority of authority would suggest that the two requirements to establish a successful in personam claim would be a known legal or equitable cause of action, and that the proprietor's conscience is affected by this cause of action. See the discussion by Butt, above n 31, pp 789–93.

56 *State Bank of New South Wales v Berowra Waters Holding Pty Ltd* (1986) 4 NSWLR 398; (1986) NSW ConvR 55-281. See also Butt, above n 31, at 793: 'In practice, the Registrar-General exercises this power only to correct obvious clerical and administrative errors.'

57 See the discussion by O'Connor, above n 25, at 219–21.

58 Land Registration Act 1925 Sch 4 paras 1–7.

59 For example, O'Connor, above n 25, at 208–16 analyses the complexity in the Canadian cases, where courts have distinguished between single transaction fraud (the forger takes on the identity of registered proprietor and sells the land to an unsuspecting purchaser) and double transaction fraud (where the wrongdoer procures registration in her or his name and then transfers to another).

60 For a discussion of the prevalence of identity theft see S F H Allison, A M Schuck and K Hersch, 'Exploring the crime of identity theft prevalence, clearance rates, and victim/offender characteristics' (2005) 33 *Jnl of Criminal Justice* 19. See also M Paphyzy and A Prpich, 'Identity Theft in an Online Environment' (2008) 11 *Internet Law Bulletin* 132.

61 M. Rannard, 'Identity Theft is increasing — survey', *Sydney Morning Herald*, 3 June 2009, <<http://news.smh.com.au>> (accessed 5 June 2009). The author was quoting from the Identity Theft Report conducted by Galaxy Research, which found that 4.4 million Australians had been affected by identity theft in the last year. If these figures are accurate, the escalating cost of this crime can be evidenced by a comparison with the work of AUSTRAC which,

system and in those jurisdictions where immediate indefeasibility is paramount, the potential undermining of the system is obvious and apparent.

In the scenario illustrated above,<sup>62</sup> both the true owner and the purchaser are intuitively innocent of any wrongdoing. Accordingly, what options exist to resolve the competing claims? First, and this must be made clear, 'the case for immediate indefeasibility is not based on irrefutable logic, but must depend on value judgements concerning the weight of conflicting policies'.<sup>63</sup>

At the outset it could be argued that if a registered proprietor has done nothing to contribute to the loss of identity, then the transfer to the purchaser is void and of no consequence. This is the approach taken under the general law system and from a consumer perspective resonates with an appeal to *nemo dat qui non habet* (the person who has not cannot give). However, the answer to this is plain — the Torrens system was introduced as a fundamental and substantive alteration of the legal principles that previously existed. Appeal to established dogma fails to comprehend that the legislative basis of Torrens was designed as a rejection of what had previously occurred, and is not in any way an endorsement. 'The legal rule of the positive system is that registration confers title to the interest shown, irrespective of whether the registered interest is valid.'<sup>64</sup>

A second consumer based option may be to analogise from the defective goods regime contained within Pt VA of the Trade Practices Act. This legislation provides that goods will have a defect if their safety is not such that persons generally would be entitled to expect. By analogy it might be submitted that the title to land containing a latent defect, such as the underlying transaction being void, is the equivalent of a product defect within Pt VA — a defect that a buyer would not be entitled to expect. Following this logic, the purchaser should prevail over the existing registered proprietor. The difficulty with this is that the product liability regime was premised on the notion that liability should be imposed upon the party who has the greatest chance and the least cost associated with the removal of the defect. This was generally seen to be the manufacturer of goods. However, to apply this to the position of the true owner in the highlighted scenario seems both inherently unfair (that person may have taken all reasonable steps to prevent the theft of their identity) but also fails to accord with the underlying theoretical framework of Torrens — the sale of property involves a surrender of the title to the Crown and the issue of a new title. Product liability thinking may well be a reason to impose liability on the state (and provide some explanation for the appearance of assurance funds) but does little to advance which of the two innocent parties should be preferred. The reasonable consumer expectation in the true owner is that her or his title is certain and not able to be arbitrarily removed, whereas the purchaser similarly has a reasonable expectation that the delivered title will be free of defect. Furthermore in some instances, it will

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some 6 years earlier, estimated that identify theft cost Australia \$1.1 billion. See Australian Government, National Crime Prevention, 'A kit to prevent and respond to identity theft', ISBN 0 642 21084 5.

<sup>62</sup> Above Figure 1.

<sup>63</sup> R Sackville, 'The Torrens System — Some thoughts on Indefeasibility and Priorities' (1973) 47 *ALJ* 526 at 531.

<sup>64</sup> O'Connor, above n 25, at 195.

be the purchaser that has the greatest opportunity and the least costs associated with ensuring that title is free of defect, particularly in respect of mortgagee indefeasibility.<sup>65</sup>

An additional option may be to amend the Trade Practices Act, and associated fair trading legislation to apply to private land sales. While the trade or commerce limitation is understandable in the context of the constitutional restrictions on the Federal Parliament, it is 'less clear why the states have similarly limited most of the fair trading provisions to situations where the conduct is engaged in by way of "trade or commerce", or, in the case of New Zealand, "trade"'.<sup>66</sup> The removal of this limitation within the fair trading legislation would see private land sales come within consumer protection. Similarly, the restriction of the right to title provisions applying to 'goods' could easily be overcome by extending this to land. However, these amendments, even if made, would not solve the conundrum in question.<sup>67</sup> The adversarial nature of this dispute is between two innocent parties. One is who we may consider to be the original true owner, the other, the purchaser from a forger (or supplier in the context of, for example, s 69 of the Trade Practices Act) who has similarly acted innocently. There is no doubt that the wrongdoer has engaged in misleading or deceptive conduct, nor did that person have the title to pass. However, for whatever reason, any remedy against them is of little utility, and demonstrating the importance of the in rem nature of proprietary rights, the dispute lies between two innocents who both seek the land.

A further novel solution suggested by the Scottish Law Commission<sup>68</sup> was to recommend that a good faith purchaser would be able to rely on the register supported by a state guarantee. If however, it was shown that the seller had not been in possession for a prescribed period (with a year given as an example), the purchaser's entitlement would be to compensation, with the property remaining with the true owner. The practical effect of this recommendation would be that the purchaser would have to undertake some form of identity check to ensure that the person selling has been in possession for that period.<sup>69</sup>

Finally, a law and economics approach would have us search for the solution which would implement the lowest transaction costs and provide the greatest benefit to society. It would ask the question as to whether immediate indefeasibility by fundamentally altering the previously accepted position has increased certainty and stability to a level that the detriment associated with

65 If C is a mortgagee, they will be able to make proof of loans dependant on adequate identity being shown. Queensland and New South Wales have introduced legislation to place an onus on mortgagees to take the appropriate steps to check identity. See Land Titles Act (Qld) s 185(1A); Real Property & Conveyancing Legislation Amendment Act 2009 (NSW) s 56(c).

66 D Everett and A Ransom, *The Fair Trading Acts*, Longman Professional, Melbourne, 1989, p 259.

67 In *Apple Computer Inc v Computer Edge Pty Ltd* (1984) (1984) 1 FCR 549; 53 ALR 225; 2 IPR 1; ATPR 40-453 it was doubted whether misleading and deceptive conduct or false representations provisions would apply to a situation where there was a complete absence of title.

68 Scottish Law Commission, *Land Registration, Void and Voidable Titles*, Discussion Paper No 125, February 2004.

69 See L Cooke, 'Land Registration: Void and Voidable Titles' (2004) 8 *Edinburgh LR* 401.

its introduction is less than the benefit obtained. There is no doubt that the introduction of the Torrens system and its central tenet of immediate indefeasibility has reduced transaction costs, and for the vast majority of citizens provides a higher level of certainty in the transacting process. As noted by Edwards and O'Reilly,<sup>70</sup> any transferee innocent of fraud can have complete confidence in the Torrens system if immediate indefeasibility is adopted. However, they note that the trade-off is that once registered, the title is at risk of loss through no fault of their own:<sup>71</sup>

Assuming the current owner and the transferee are equally risk-averse, one needs to examine whether either party can reduce their risk (and at what costs) . . . It appears that the costs to the current owner in reducing their risk in validating the bona fides of people to whom they allow access to the title documents would usually be cheaper than the costs of transferees in validating identities of signatories. Thus, it seems that current owners are in fact usually best placed to reduce the risks in the most cost effective way, and therefore that immediate indefeasibility is more efficient than deferred indefeasibility.<sup>72</sup>

By having the title reissued from the Crown, the new registered proprietor, can, for the most part, rest easy that they have the interest contained in the certificate of title, that they are subject to no more encumbrances than are noted in the certificate of title, that their ownership will be secure (subject to the present debate between immediate and deferred indefeasibility) and their interest transferable.<sup>73</sup> But the instant conflict highlights that despite the intent, '[r]egistration is neither as conclusive in fact as in theory'.<sup>74</sup> With the overwhelming majority of frauds committed by those known to the registered proprietor,<sup>75</sup> the question remains — who could most easily reduce the risk and what is in accord with consumer expectations. Do we impose obligations upon every purchaser of land to check the identity of the vendor, or conversely would it be simpler to impose some form of qualitative obligation on each of us to ensure that our identity is not stolen. For example, we appear to impose no positive obligation to protect our own position by removing or controlling access to the certificate of title. By way of contrast we, as a community, impose far greater obligations to protect our financial details with the Electronic Funds Transfer Code of Conduct<sup>76</sup> imposing burdensome obligations on the consumer. For example, the account holder will be liable for unauthorised transactions if it can show on the balance of probabilities that the customer contributed to the loss through her or his:

- Fraud;

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70 R Edwards and J O'Reilly, [1999] *Singapore Jnl of Legal Studies* 82.

71 Ibid, at 109.

72 Ibid, at 109. See also their summary of the evidence at 110.

73 See the comments by J L McCormack, 'Torrens and Recording: Land Title Assurance in the Computer Age' [1992] 18 *William Mitchell L Rev* 61 at 74–5.

74 M Friedman, *Contracts and Conveyances of Real Property*, 4th ed, 1984, §3.12, at 304, quoted in McCormack, above n 73, at 90.

75 C Hammond, 'The Abolition of the Duplicate Certificate of Title and its Potential Effect on Fraudulent Claims over Torrens land' (1999) *APLJ Lexis* 23 at 30 of online version.

76 ASIC, *Electronic Funds Transfer Code of Conduct*, 1 April 2001, amended subsequently 18 March 2002 and 1 November 2008, at <www.asic.gov.au>.

- Unreasonably delaying notification of the misuse, loss or theft of the [card];
- Voluntarily disclosing the code to any person including family member or friend;
- Noting the code on the [card], or near the [card];
- Maintaining a record of the code where it is liable to loss or theft simultaneously with the [card];
- Extreme carelessness in maintaining the security of the code.

Perhaps surprisingly, and with the potential for greater loss associated with eviction from the home, similar safeguards have not been imposed on those holding the certificate of title.<sup>77</sup>

### How can consumer law inform the debate?

The starting point for this analysis begins with the words of Pitofsky: '[P]rotection of consumers . . . should not be a broad, theoretical effort to achieve Truth, but rather a practical enterprise to ensure the existence of reliable data which in turn will facilitate an efficient and reliable competitive market process.'<sup>78</sup> Ramsay has a similar understanding: 'Consumer law is an instrumental form of law, organised around achieving the goals of efficient and fair consumer markets.'<sup>79</sup> Immediate indefeasibility supports at least the efficiency of the market, though arguably not its fairness. The theory behind immediate indefeasibility simply being that the purchaser of an interest in land should not be required to undertake detailed inquiries of the title held by the owner of the land. Registration itself should provide the source of title. It, as outlined, directly favours dynamic security at the expense of static security. Combined with increasing obligations imposed on mortgagees to undertake identity checks,<sup>80</sup> certainty of the transaction is promoted at the expense of the existing landowner. By contrast, the rationale for deferred indefeasibility rests on a belief that within the Torrens system reliance on the register is critical. If therefore the purchaser has relied not just on the register but on the ostensible identity of the forger selling the land (a fact outside of the register), then the Torrens system should not protect the purchaser but should only work to assist where the innocent, but duped, individual on-sells to a second

<sup>77</sup> In Queensland, the certificate of title in paper form no longer exists, and with the introduction of a national electronic conveyancing system mooted for 2011 (<www.necs.gov.au>), the mechanisms for how fraud may be perpetrated may well alter: R Low, 'Opportunities for Fraud in the Proposed National Electronic Conveyancing System: Fact or Fiction' [2006] *Murdoch Uni Jnl of Electronic Law*.

<sup>78</sup> R Pitofsky, 'Beyond Nadar: Consumer Protection and the Regulation of Advertising' (1977) 90 *Harv L Rev* 661 at 671.

<sup>79</sup> I Ramsay, 'Consumer Law, Regulatory Capitalism and the "New Learning" in Regulation' (2006) 28 *Syd LR* 2 at 2.

<sup>80</sup> Queensland has had this in place since 2005: Land Title Act 1994 (Qld) s 185(1A). This provides that a registered proprietor will not obtain the benefit of indefeasibility if the mortgagee fails to comply with s 11A(2). This states: 'Before the instrument of mortgage is lodged for registration, the mortgagee under the instrument (the original mortgagee) must take reasonable steps to ensure the person who executed the instrument as mortgagor is identical with the person who is, or who is about to become, the registered proprietor of the lot or the interest in the lot.' Similar provisions have been adopted in New South Wales, see Real Property and Conveyancing Legislation Amendment Act 2009, introduction of s 56C.

innocent purchaser.<sup>81</sup> What responses can be offered to solve this conundrum? A first response to counterbalance the dangers of immediate indefeasibility would be to promote a far greater public perception and understanding of the inherent dangers in being a 'static' owner of Torrens title land. This has not occurred in Australia and contrasts with Canada and Malaysia where the operation of the Torrens system and the perceived immoral nature of home loss from the operation of immediate indefeasibility led to a public outcry.<sup>82</sup> If the first step in the pyramid of consumer protection is one of empowerment, education of the public is necessary so that as with PIN codes, an appreciation of the need to guard against loss of the certificate of title and identity theft is more widely understood. By so doing, consumer protection can be seen as improving the relationship that exists between the state, on one hand, and its citizens, on the other.<sup>83</sup> It is the first step in ensuring the balance between the static owner and the dynamic transaction. The policy choices undertaken by government must be transparent along with the reasons for their introduction. The current judiciary seem almost blithely unaware of the consequences of the operation of immediate indefeasibility. For this reason, the legislature must fill the void. Without so doing, and if there is potential for increased loss through more sophisticated criminal activity in relation to land titles as we approach and integrate electronic transactions,<sup>84</sup> the scorn of those affected in the community will be long heard and only be seen to promote a response that may well undermine much of the good provided by the introduction of the Torrens system. Second, the promotion of certainty within the transaction that is favoured by dynamic security and immediate indefeasibility ultimately stems from a belief that the certainty provided by this lowers the transaction and information costs associated with the purchase of property. It allows the commerce of business to trade securely and safely in the knowledge that the transaction will be upheld. It favours the movement of the land to those who value it the most. It is a crystalline rule of certainty and precision. '[These rules] are the very stuff of property: their great advantage, or so it is commonly thought, is that they signal to all of us, in a clear and distinct language, precisely what our obligations are and how we may take care of our interests.'<sup>85</sup> But as Rose further notes,<sup>86</sup> in a brief reference to the Torrens system, the crystalline nature of property entitlements must yield, and in Australia, and dependant somewhat on the jurisdiction, we see exceptions for statutory fraud, government charges, adverse possession, omitted easements and the interests of the tenant. Later legislation can also override, with an exemplar of this provided in the Environment Management and Pollution Control Act (Tas) s 74M<sup>87</sup> that states: 'Nothing in [the indefeasibility section

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81 See B Ziff, *Principles of Property Law*, 3rd ed, Carswell, 2000, p 427.

82 See O'Connor, above n 25, at 211 (Canada), at 218 (Malaysia).

83 See the comments by D M Trubek, 'Consumer Law, Common Markets and Federalism: Introduction and General Concepts' in I T Bourgoignie and D Trubek, *Integration through Law: Europe and the American Federal Experience*, Walter De Gruyter, Berlin, 1986, p 6.

84 Low, above n 77.

85 C M Rose, 'Crystals and Mud in Property Law' (1988) 40 *Stanford L Rev* 577 at 577.

86 See generally, Rose, above n 85, at 588–90.

87 An interesting approach to the paramountcy of indefeasibility can be seen in recent changes to New South Wales introduced by the inclusion of s 42(3) by the Real Property and

of the Torrens legislation] affects the validity of a [contamination] notice or prejudices or affects the operation of a notice.’ In these statutorily crafted, judicially imposed or legislatively mandated circumstances, indefeasibility is required to yield in the name of a different policy objective, and from a consumer perspective, the battle between immediate and deferred comes down to the morality of allowing a transaction by a forger to have legal effect. Do we promote the security of the transaction at the expense of the existing owner? In answering this dilemma, and rather than look at fairness ex-post, the suggestion is made that the examination be done ex-ante.<sup>88</sup> Therefore, rather than see what is so unfair about the eviction of the homeowner through the operation of indefeasibility, ask what we would anticipate the parties to reasonably expect prior to any transaction and what should be the understanding and responsibility of each of us to protect against misuse by others of our own entitlements. The focus is on the rules, rather than on the standards of behaviour that has occurred. We would expect the homeowner to take care of their interests, and to protect against loss. Similarly, we would hope the purchaser would not be reckless or indifferent with whom they are dealing with, and that, as the Queensland and NSW legislation has done,<sup>89</sup> impose obligations on those who can easily check identity. In this sense, the difference between what has occurred in Australia with these legislative developments and the use in Canada of deferred indefeasibility may be less than previously thought — the Canadian authorities accepting that due diligence is an element of deferred indefeasibility.<sup>90</sup> Whatever may be the avenue, we need the principles to be clear in advance and easily understood. By so doing, we promote a fair and informed market, which as indicated favours the instrumental nature of consumer protection law. Nevertheless, what must be emphasised is that the clear, harsh, blunt nature of immediate indefeasibility must not work in such a way as to deliver unfairness that would work against the accepted culture that exists within society. ‘Decisions . . . are constitutive, and it would corrode our moral understanding of ourselves as a society if we were to permit gross unfairness to reign simply for the sake of retaining clear rules and rational ex ante planning, particularly if those rules covertly serve the wealthy and powerful.’<sup>91</sup> It is suggested that what fails in our Torrens system, and the reason for the dichotomy within jurisdictions between deferred and immediate indefeasibility, is that the consumer in the context of landowner does not understand the fragility of their interest in quite possibly their most vital asset, the asset that connects them to the planet and which provides a sense of belonging within the community. Their lack of knowledge that they can be evicted without any sense of wrongdoing is

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Conveyancing Legislation Amendment Act 2009: ‘[The indefeasibility section] prevails over any inconsistent provision of any other Act or law unless the inconsistent provision expressly provides that it is to have effect despite anything contained in this section.’

88 See generally, F Easterbrook, ‘The Supreme Court 1983 Term — Foreword: The Court and the Economic System’ (1984) 98 *Harv L Rev* 4.

89 See above n 87.

90 *Rabi v Rosu* (2006) 83 OR (3d) 37; 277 DLR (4th) 544 at [48]. For a discussion of this case, see J Girgis, ‘Mortgage Fraud, the Land Titles Act and Due Diligence: The *Rabi v Rosu* Decision’ (2007) 22 *BRLR* 419.

91 Rose, above n 85, at 593, in reference to the work of L Tribe, ‘Constitutional Calculus: Equal Justice or Economic Efficiency?’ (1985) 98 *Harv L Rev* 592.

understandably offensive in any society governed by the Rule of Law, with the leading nation states to utilise rectification, introduce deferred indefeasibility, deny indefeasibility to volunteers<sup>92</sup> or have the judiciary attempting through in personam to ameliorate the harshness of immediate indefeasibility. At its heart, the Torrens system involves the purchase of property subject to an option — that option being the potential for title to be lost, and for the homeowner to be evicted as a result of unethical and illegal activity, through no fault of their own. This rule is not well known outside of legal and academic circles and without appreciation in the wider community. This must be corrected.

## Conclusion

As noted at the outset, both Kevin Gray and the High Court warn against the power of the state (in this instance through its regulatory institutions of the judiciary and the manner in which legislation is drafted) forcing one individual to recognise a transfer of property to another when a wrongdoer intermediary has intervened to dupe both parties. Why should the homeowner with an emotional connection and a financial investment be forced to accept monetary compensation when the new purchaser's only commitment so far has been financial? The answer to this lies in our expectations. Both parties legitimately have reasonable expectations, and while the response may be that where you have an assurance system the new purchaser can more easily be compensated in financial terms, the underlying goal of consumer law is not to seek truth but to have a fair and informed market. The first step in achieving this is marrying the property principles of Torrens with the consumer by way of education. Empower the consumer to become aware of the vagaries of their title to land, and inform them on how to protect. The search as to whether each jurisdiction should adopt immediate or deferred indefeasibility should not be considered in isolation. The perfect doctrinal solution is unlikely to exist. Consumer protection is, after all, never absolute. Any measure taken under this rubric will involve costs and benefits. The pertinent question is how much cost are we as a community prepared to bear. Moreover, how much protection do we want to give each individual involved in the consumer transaction?

As O'Connor<sup>93</sup> notes: 'Bijural stress is most pronounced in those jurisdictions which use the rule of immediate indefeasibility, because the disjunction between the ordinary rules and the positive system is all the greater.' My response is that the Torrens system was intended to create that disjunct, and the mean-spirited nature of immediate indefeasibility flows from a legislative and occasional judicial reluctance to view the Torrens system as not merely an addition to what previously existed, but as a new building not merely separate but divorced from what has gone on in the past. At its heart the rationale for immediate indefeasibility comes down to a judgment that home purchasers at a minimum, (with arguably a different rule applying for mortgagees), should not be required to undertake an enquiry into the identity of the person with whom they are dealing:

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<sup>92</sup> For example contrast *Rasmussen v Rasmussen* [1995] 1 VR 613; [1995] ANZ ConvR 130 with *Conlan v Registrar of Titles* (2001) 24 WAR 299; [2001] WASC 201; BC200104400.

<sup>93</sup> Above n 25, at 223.



Deferred indefeasibility potentially threatens the security of *all* titles . . . Ultimately the most convincing rationale for immediate indefeasibility lies in the proposition that no purchaser of Torrens land should be required to investigate the history of the vendor's titles or to make inquiries that are burdensome or difficult.<sup>94</sup>

The immediate response to this is that the due diligence required under deferred indefeasibility is limited with the purchaser, for the most part, protected against the narrative of the title's underlying corruption. In summary, however, consumer protection demands that at least for home purchasers immediate indefeasibility is to be preferred. The cost of the homeowner in protecting her or his identity and the documents associated with land ownership are less than would be required by the purchaser investigating the identity of the vendor with whom they deal. The same cannot be said of mortgagees. They have the arsenal at their disposal and the systems embedded in their processes to verify the identity of the person with whom they deal. Consumer protection requires that the onus be placed on the financier. In starting with immediate indefeasibility though, the question for any community is how to soften the immoral results that can occur. An ex-ante examination asks us to consider what the parties should do, and would be expected to do before the transaction begins. Education and regulatory safeguards must be put into the new electronic conveyancing system that is now on the horizon, and while no system will ever be impenetrable, it is a system that can still adopt immediate indefeasibility and still serve generally understood community expectations.

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94 Sackville, above n 63.

8-12-2010

# Curial Discretion in the Drafting of Caveats: Is it Preserving the Integrity of the Register?

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### Recommended Citation

Griggs, Lynden (2009) "Curial Discretion in the Drafting of Caveats: Is it Preserving the Integrity of the Register?," *Bond Law Review*: Vol. 21: Iss. 2, Article 5.  
Available at: <http://epublications.bond.edu.au/blr/vol21/iss2/5>

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# Curial Discretion in the Drafting of Caveats: Is it Preserving the Integrity of the Register?

## **Abstract**

The role of unregistered interests in the Torrens system has always attracted controversy. On the one hand, the inclusion of provisions such as s 41 of the Victorian Transfer of Land Act 1958, (and its equivalent in other jurisdictions) may have led to no recognition of any estate or interest outside of the register. However early in the history of Torrens jurisprudence, the existence and enforceability of interests outside of the register was accepted, despite their non-appearance on the official government record, (though one may speculate whether this recognition in 1914 would have occurred if immediate indefeasibility had been foreshadowed or adopted prior to the decision of *Barry v Heider*). Even more explicit than this early common-law recognition were provisions within the legislation allowing for the protection of unregistered interests, the primary illustration being the caveat. Notwithstanding this legislative and curial espousal of the proprietary interest outside of the official record, the exact role for the caveat has long been a matter of debate. However, the recent High Court decision of *Black v Garnock* has graphically highlighted the importance and contemporary role of the caveat. Accordingly, the purpose of Part 1 of this paper is, first, to consider the decision in *Black v Garnock* and highlight its ramifications for conveyancing practice. In Part II there will be consideration of the jurisprudence surrounding the judicial discretion to remove, amend, or allow a defective caveat to stand. Given the uncertainty surrounding the capacity to amend a defective caveat, (and the High Court in *Black* emphasising the importance of the caveat) this analysis is critical. After this examination, the question is whether the substantive and procedural law on caveats serves to enhance the integrity of the Torrens register. If not, and accepting for the moment that there needs to be some mechanism for the pre-emptive protection of unregistered interests, what changes can easily be made (and which don't involve a fundamental re-evaluation of the underlying precepts) to enhance the Torrens system

## **Keywords**

curial discretion, caveats, torrens system

## CURIAL DISCRETION IN THE DRAFTING OF CAVEATS: IS IT PRESERVING THE INTEGRITY OF THE REGISTER?

LYNDEN GRIGGS\*

### I Introduction

The role of unregistered interests in the Torrens system has always attracted controversy. On the one hand, the inclusion of provisions such as s 41 of the Victorian *Transfer of Land Act 1958*, (and its equivalent in other jurisdictions)<sup>1</sup> may have led to no recognition of any estate or interest outside of the register. However early in the history of Torrens jurisprudence, the existence and enforceability of interests outside of the register was accepted, despite their non-appearance on the official government record, (though one may speculate whether this recognition in 1914 would have occurred if immediate indefeasibility had been foreshadowed or adopted prior to the decision of *Barry v Heider*).<sup>2</sup> Even more explicit than this early common-law recognition were provisions within the legislation allowing for the protection of unregistered interests, the primary illustration being the caveat. Notwithstanding this legislative and curial espousal of the proprietary interest outside of the official record, the exact role for the caveat has long been a matter of debate.<sup>3</sup> However, the recent High Court decision of *Black v Garnock*<sup>4</sup> has graphically

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<sup>1</sup> 'Subject to this Act no instrument until registered as in this Act provided shall be effectual to create vary extinguish or pass any estate or interest or encumbrance in on or over any land under the operation of this Act, but upon registration the estate or interest or encumbrance shall be created varied extinguished or pass in the manner and subject to the covenants and conditions specified in the instrument or by this Act prescribed or declared to be implied in instruments of a like nature.'

*Transfer of Land Act 1958* (Vic), s 40(1). For equivalent provisions see *Real Property Act 1900* (NSW) s 41(1); *Land Title Act 1994* (Qld) (no equivalent provision); *Real Property Act 1886* (SA) s 67; *Transfer of Land Act 1893* (WA) s 58; *Land Titles Act 1980* (Tas) s 49(1); *Land Titles Act 1925* (ACT) s 57(1); *Land Title Act* (NT) (no equivalent provision).

<sup>2</sup> *Barry v Heider* (1914) 19 CLR 197.

<sup>3</sup> The importance of caveats can be illustrated by the vast array of written academic and judicial commentary on the topic. See the list of articles cited at B Edgeworth, C Rossiter and M A Stone, *Sackville and Neave Property Law Cases and Materials*, 8th edition, LexisNexis Butterworths, Pyrmont, 2008, [5.152].

highlighted the importance and contemporary role of the caveat. Accordingly, the purpose of Part 1 of this paper is, first, to consider the decision in *Black v Garnock* and highlight its ramifications for conveyancing practice. In Part II there will be consideration of the jurisprudence surrounding the judicial discretion to remove, amend, or allow a defective caveat to stand. Given the uncertainty surrounding the capacity to amend a defective caveat, (and the High Court in *Black* emphasising the importance of the caveat) this analysis is critical.<sup>5</sup> After this examination, the question is whether the substantive and procedural law on caveats serves to enhance the integrity of the Torrens register. If not, and accepting for the moment that there needs to be some mechanism for the pre-emptive protection of unregistered interests, what changes can easily be made (and which don't involve a fundamental re-evaluation of the underlying precepts) to enhance the Torrens system.

## II Part I: *Black v Garnock*

The facts can be summarised:

- (17/9/2004): Black obtains judgment against the registered proprietor for \$288,000.
- (15/7/2005): The registered proprietor contracts to sell land to Garnock for \$1ml. Garnock pays a deposit of \$100,000.
- (19/8/2005): Solicitors for the registered proprietors advise Black's solicitors that settlement will occur on August 24, 2005. However, there will not be any proceeds left over to pay the money owing to Black.
- (24/8/2005): Settlement - the following events occur:

**9am:** Garnock's solicitors undertake a search of title, and only discover encumbrances already known.

**9.20am:** Black's solicitors call Garnock's solicitors and indicate that they intend to prevent the sale going ahead. They advise that settlement should not proceed. In addition, they inform Garnock's solicitors that they have obtained a charging order against the deposit as well as instituting bankruptcy proceedings. Following this phone call, Garnock's solicitors confirm the existence of the charging order, but find no mention of a bankruptcy notice on the official records.

**11.53am:** Recording of the writ of execution is completed, but Black does not advise Garnock of this.

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<sup>4</sup> (2007) 230 CLR 438; 237 ALR 1; 81 ALJR 1338.

<sup>5</sup> *Midwarren Estates Pty Ltd v Retek and Stivic* [1975] VR 575; *Elliott v Blanshard* (1970) 17 FLR 7; *Re CM Group Pty Ltd's Caveat* [1986] 1 Qd R 381.

*2pm*: Settlement takes place without a further title search. Garnock pays balance of purchase price.

- (8/0/2005): Garnock's solicitors receive advice that the registration of the transfer cannot occur because of the presence of the writ of execution. An attempt to lodge a caveat by Garnock is unsuccessful. The purchasers having paid the full purchase price are unable to have the title registered.

Despite the simple facts, the issue was one that divided the High Court 3:2, and the New South Wales Court of Appeal 2:1, with the High Court upholding an appeal from the lower court. The resolution of the case depended on an answer to the following: should the equitable interest created first in time pursuant to the contract prevail over the later interest, registration of which occurred with notice and knowledge of what had gone on earlier. The majority in the High Court and the minority in the New South Wales Court of Appeal were clear. The registered writ prevailed. By contrast, the majority in the New South Wales Court of Appeal allowed an injunction by Garnock forbidding the sheriff from executing the writ for 60 days, with this operating to preserve the interest of Garnock from elimination by statutory sale. Despite the polar opposition in result (which can be appreciated was ultimately catastrophic for Garnock), the bifurcation between the majority and the minority judges centered on the purpose and role of the caveat provision. The majority (Gummow and Hayne JJ. jointly; Callinan J. separately) considered that once the writ of execution was recorded on title, (of which all States except Western Australia appear to have somewhat similar provisions)<sup>6</sup> the legislation operated to provide the Sheriff with a protected period by which he or she could sell the property. To grant an injunction against the Sheriff was contrary to the intent and direction provided by the legislation. The view of the majority was that the purchaser had the arsenal available to protect their own position. They could have caveated. Gummow and Hayne JJ. ask this very question – 'If before the writ was recorded on the register, the purchasers had lodged caveats on the titles to the land, claiming an interest as purchasers of the land, how would the relevant provisions of the [Torrens legislation] have operated.'<sup>7</sup> The answer to this was clear: '[I]f caveats had been lodged and particulars of the caveats entered on the register, and if the sheriff then sought to sell the land in execution of the writ, a purchaser at the sheriff's sale would not have been able to obtain registration of a transfer of the land so long as those caveats remained

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<sup>6</sup> *Transfer of Land Act 1958* (Vic), s 52; *Real Property Act 1900* (NSW) s 105; *Land Title Act 1994* (Qld) s 117; *Real Property Act 1886* (SA) s 110; *Transfer of Land Act 1893* (WA) (no equivalent provision); *Land Titles Act 1980* (Tas) s 61; *Land Titles Act 1925* (ACT) s 170; *Land Title Act* (NT) s 133.

<sup>7</sup> *Black v Garnock* (2007) 230 CLR 438, [42].

in force.’<sup>8</sup> According to their Honours, the construction of the legislation demanded this conclusion.<sup>9</sup> However, this construction by the majority is open to criticism. Practically what would have occurred if lodging of the caveat occurred before the recording of the writ? One could suggest that not only would the caveat have prevented the Sheriff’s sale from proceeding, but also the purchasers would similarly have been unable or unwilling to complete the transfer. Both parties would have stood ‘toe to toe’ with each other, with the likely outcome some form of compromise depending on the financial imperatives facing each party. ‘The drafters of the legislation appear to have overlooked these practical consequences – a classic example of seeking to address a perceived ill without full consideration of the conveyancing problems likely to occur.’<sup>10</sup>

Whereas Gummow and Hayne JJ. spoke directly to the wording of the legislation, the judgement of Callinan J. resonated with an appeal to the policy of Torrens and the practices of prudent conveyancers. His Honour began his judgement lamenting the failure of present practitioners to lodge caveats in favour of registrable dealings in pre-emptive protection of their clients’ interests,<sup>11</sup> and noting that: ‘The questions raised in this case would be unlikely to have arisen had those salutary practices not fallen into disuse, whether by reason of electronic recording of dealings or otherwise, although it is difficult to understand why some comparable prudent practice would not equally, and perhaps more easily, have been adopted there to accommodate electronic lodgement, searching and recording.’<sup>12</sup> Significantly, Callinan J. expressly questions, and disagrees with the earlier reasoning of the High Court in *J & H Just Holdings v Bank of New South Wales*<sup>13</sup> as to the purpose and role of a caveat. In *Just* the registered proprietor had executed a mortgage in favour of the Bank of New South Wales. The bank did not register the mortgage, nor did they lodge a caveat.

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<sup>8</sup> *Black v Garnock* (2007) 230 CLR 438, [43].

<sup>9</sup> *Black v Garnock* (2007) 230 CLR 438, [44]-[50].

<sup>10</sup> DKL Raphael, *Black v Garnock: A Practitioner’s Perspective*, (2007) 81 ALJ 851, 851-852: ‘One could, with a little respectful cynicism, suggest that, had a caveat been lodged on the purchaser’s behalf before the writ was recorded, a ‘standoff’ would have followed. Not only would the caveat have prevented the transfer executed at a sheriff’s sale from being registered, but as a practical matter the purchasers would not have completed their transfer without paying the amount of the judgement debt, as well as mortgages and other charges affecting the title of the registered proprietor. The drafter of the legislation appears to have overlooked these practical consequences – a classic example of seeking to address a perceived ill without full consideration of the conveyancing problems likely to occur.’

<sup>11</sup> *Black v Garnock* (2007) 230 CLR 438, [52].

<sup>12</sup> *Black v Garnock* (2007) 230 CLR 438, [53].

<sup>13</sup> (1971) 125 CLR 546.

However, they retained possession of the duplicate certificate of title. Three years later the appellant obtained a mortgage over the land. Again, registration did not occur, the appellants were satisfied with the registered proprietor's explanation that the duplicate certificate of title was merely with the bank for safekeeping. No encumbrances were discovered on a search of the register. J & H Just Holdings sought a declaration that its mortgage was entitled to priority over the bank's mortgage. In holding in favour of the bank, Barwick CJ. stated that:

To hold that a failure by a person entitled to an equitable estate or interest in land under the *Real Property Act* to lodge a caveat against dealings with the land must necessarily involve the loss of priority which the time of the creation of the equitable interest would otherwise give, is not merely in my opinion unwarranted by general principles or by any statutory provision but would in my opinion be subversive of the well recognised ability of parties to create or to maintain equitable interests in such lands.<sup>14</sup>

In directly responding to this, Callinan J. in *Black v Garnock* was equally adamant that:

What is much more likely to be subversive of the whole of the scheme of the Torrens system is that a person interested in, or entitled to deal with, land, who has not acted fraudulently, might suddenly and unexpectedly be saddled with, or postponed to, an equitable estate or interest in land which could have been, but was not, made the subject of protection by prompt lodgement of an instrument or the filing of a caveat pending the lodgement.<sup>15</sup>

The minority judges, (Gleeson CJ and Crennan J. in separate judgements) disagreed with the approach taken by the majority. Specifically Crennan J. saw the issue in the following terms: '[T]he question on the appeal to this court was whether the purchasers were entitled to an injunction, before a sale to any other purchaser, to restrain the judgement creditors and the sheriff from execution of the writ which was recorded on the register, after the purchasers had acquired an interest in the land, but

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<sup>14</sup> (1971) 125 CLR 546, 554. Contrast Menzies J (at 557) where his Honour, whilst agreeing with the other members of the Court noted that the 'The reason for such an entry [of a caveat] must be to give notice of the caveat.' See also Windeyer J (at 558) who considered that [T]he fact that a caveat discoverable by a search of the title is 'notice to all the world' of the interest does not mean that the absence of a caveat is a notice to all and sundry that no interest in claimed. To say that it would, it seems, be to equate the noting of a caveat in the register book with the registration of a dealing: it would make competing equitable interests depend not upon the priority of creation in time and other equitable considerations, but upon priority of the lodgement of caveats.'

<sup>15</sup> *Black v Garnock* (2007) 230 CLR 438, [80].



before they had registered that interest.’<sup>16</sup> In her Honour’s view the provisions allowing for the Sheriff to have a protected period was designed to give priority to a purchase from the Sheriff during this period against any transactions conducted by the registered proprietor. In this instance, the judgement debtor had contracted to sell prior to the commencement of the protected period.<sup>17</sup> The lodging of the writ created the interest, not the failure to lodge a caveat<sup>18</sup> and it was for another day the resolution of the interaction between the caveat provisions and the legislative provisions dealing with the recording of writs.<sup>19</sup>

### III Implications post *Black v Garnock*<sup>20</sup>

There is no doubt that *Black v Garnock* could, and in this writer’s view should, alter conveyancing practice. Specifically, the implications of this important decision are as follows:

- (i) In those jurisdictions where prudent conveyancing practice does not involve the lodgement of a priority (Tasmania) or a settlement (Queensland) notice, it may well now be professionally negligent not to lodge a caveat in protection of a client’s interest pending settlement;<sup>21</sup>
- (ii) The decision may promote the use of stay orders in Victoria,<sup>22</sup> or Western Australia;<sup>23</sup>
- (iii) Conveyancers should seek to ensure that registration is not delayed unduly, and that the protection to the purchaser is extended until settlement occurs;

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<sup>16</sup> *Black v Garnock* (2007) 230 CLR 438, [119].

<sup>17</sup> *Black v Garnock* (2007) 230 CLR 438, [124].

<sup>18</sup> *Black v Garnock* (2007) 230 CLR 438, [131], per Crennan J.

<sup>19</sup> *Black v Garnock* (2007) 230 CLR 438, [131].

<sup>20</sup> See also T Cahill, ‘Caveats – current issues’, (2008) 16 *APLJ* 87, 100-103.

<sup>21</sup> See the comments by P Butt, *Land Law*, 5<sup>th</sup> edition, LawBook Co, Pyrmont, 2006, 755 who notes that it is not the case that purchasers would routinely lodge caveats – but only do so in circumstances where there is a delayed settlement, a purchase off the plan, release of deposit, or perceived unusual risk.

<sup>22</sup> *Transfer of Land Act 1958* (Vic), ss 92-93.

<sup>23</sup> *Transfer of Land Act 1893* (WA), s 148 – for a discussion of this provision, see M. Calzada, ‘The Stay Order Procedure in Victoria and Western Australia: Deadletter Law or Negligent Disregard of Available Provisions’, (1998) *APLJ Lexis* 43. He comments (at 4 of online version) that: ‘It is remarkable that those in other States most at risk, namely banks and other finance providers, seem to choose to expose themselves to potentially substantial losses and particularly so in Victoria and Western Australia where the statutes already make provisions that substantially mitigate the risks.’

- (iv) Searches of the register should be undertaken as close to settlement as is feasible, and preferably at the office of the Recorder;<sup>24</sup>
- (v) Legal practitioners will need to consider how to protect the risk undertaken by a purchaser in an 'off the sale' plan. These routinely prevent the lodging of a caveat by a potential purchaser pending the issue of title. Purchasers will need to be appraised of this risk, and consideration given as to mechanisms by which the deposit may be protected;<sup>25</sup>
- (vi) Financial institutions will need to work with the purchaser's solicitors or conveyancing agents to ensure protection of the mortgagees interest;
- (vii) The decision promotes the use of title insurance. The Garnock's, if they had title insurance, may well have been compensated for their loss;
- (viii) The result may lead to legislative amendment. At the time of writing, the New South Wales Law Society is considering putting forward amendments to provide for priority to purchasers in the position of Garnock. Similarly, the Victorian Law Institute has submitted to the Law Council of Australia<sup>26</sup> that Land Registry fees have priced the lodging of caveats out of the market and that Queensland and Tasmanian practices of settlement and priority notices may provide a cheaper and more administratively efficient solution to this dilemma. This comment was made after noting that one of the main categories of solicitors' professional negligence claims is for failure to lodge a caveat;
- (ix) Finally, in those jurisdictions where the caveat is the only pre-emptive protection offered for the purchaser, careful consideration of its wording is

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<sup>24</sup> *Black v Garnock* (2007) 230 CLR 438, [49] per Gummow and Hayne JJ., and [52]-[53] per Callinan J – though this latter suggestion of settlement at the Recorder may well have significant practical restrictions (i.e. absence of settlement rooms).

<sup>25</sup> One possibility may be the establishment of a Quistclose Trust: *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567; *Re Australian Elizabethan Theatre Trust; Lord v Commonwealth Bank of Australia* (1991) 30 FCR 491.

<sup>26</sup> Letter of January 7, 2008.

required. In order to save costs, it may be necessary to have the caveat drafted so that withdrawal is unnecessary prior to settlement.<sup>27</sup>

#### IV Part II: Curial Discretion in the Drafting of Caveats

With *Black v Garnock* foreshadowing an even greater role for caveats, attention will focus on the role that the courts should have when determining the validity of a caveat. Each jurisdiction establishes its own formal requirements for caveats.<sup>28</sup> Generally, these require the specification of the nature of the estate, a description of the land and the facts specifying the basis of the caveat.<sup>29</sup> Over reliance on these formal requirements has attracted a number of critics,<sup>30</sup> with some suggesting the value of the caveat provisions has been compromised by pedantic attention to the legislative direction.<sup>31</sup> As to whether the quantum must be stated is a matter of some divergence between jurisdictions.<sup>32</sup> However, with New South Wales having specific legislation permitting the waiving of the formal requirements,<sup>33</sup> and courts in other jurisdictions being prepared to overlook technical difficulties, the question becomes one of isolating the process in which the discretion will be utilised, and more broadly speaking, whether some other form of protection is needed for the creation and protection of unregistered interests. The matter is of some practical importance given the court's power to amend defective caveats is unclear with Aristei noting the inconsistency in the cases.<sup>34</sup> For example, in a series of cases analysed by Underwood

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<sup>27</sup> See the comments by D L A Phillips Fox, 'From the Ground Up – Legal updates for the New South Wales Built Environment', 13 December 2007, 4/6 of online version – accessed July 3, 2007 <<http://www.dlaphillipsfox.com>>.

<sup>28</sup> *Transfer of Land Act 1958* (Vic), s 89(1); *Real Property Act 1900* (NSW) s 74F(5); *Land Title Act 1994* (Qld) s 121; *Real Property Act 1886* (SA) s 191(a); *Transfer of Land Act 1893* (WA) s 137; *Land Titles Act 1980* (Tas) s 133(1); *Land Titles Act 1925* (ACT) s 104(2); *Land Title Act* (NT) s 137.

<sup>29</sup> *Sullivan v McMahon* [1999] WASC 83; *Re Jones* (1935) 35 SR(NSW) 560; *Re Whalley's Caveat* [1975] QD R 111; *George v Biztole Corp Pty Ltd* (1995) V ConvR 54-519; *Vandyke v Vandyke* (1976) 12 ALR 621.

<sup>30</sup> *Beca Developments Pty Ltd v Idameneo (No 92) Pty Ltd* (1990) 21 NSWLR 459, 467-468; *Gasiunas v Meinhold* (1964) 6 FLR 182.

<sup>31</sup> *Buddle v Russell* [1984] 1 NZLR 537, 539.

<sup>32</sup> *Kerabee Park Pty Ltd v Daley* [1978] 2 NSWLR 222; *Beca Developments Pty Ltd v Idameneo (No 92) Pty Ltd* (1990) 21 NSWLR 459. In Tasmania, it has been doubted as to whether the quantum must be specified *Smith v Longden* (1997) 7 Tas R 194; *Four Oak Enterprises Pty Ltd v Clark* [2002] ANZ ConvR 440.

<sup>33</sup> *Real Property Act 1900* (NSW) s 74L.

<sup>34</sup> A J Aristei, 'Recent Developments in the law of caveats', (2008) *APLJ* 62, 67.

J in *Patmore v Upton*,<sup>35</sup> one view was that the amendment power was largely unconstrained, with the following comment in *Hooper v Australia and New Zealand Banking Group Ltd*<sup>36</sup> illustrative of this:

In my opinion, the nature and purpose of a caveat is such that technical deficiencies in its form and content should not be allowed to deprive a bona fide claimant from obtaining the advantage and breathing space that prompt notification of his claim to the Registrar should, in principle, permit him to achieve. This does not mean that a fallacious claim should be allowed to clog the title or that imprecision or obfuscation should be rewarded, but if Stout CJ was correct in *Plimmer v St. Maur* <sup>37</sup>when he said:

In my opinion the caveat cannot be set aside unless the claim appears to be without any validity. If there is a reasonable question to argue the court should not remove the caveat, but permit the matter to be litigated.

(and, with respect, I think he was) the Court should not destroy or impede bona fide claims either by declining to amend an arguably deficient caveat or by removing it from the Register.

Contrasting with this, Underwood J. in *Patmore v Upton*<sup>38</sup> did recognise that cases that are more recent highlighted a more restrictive approach. This line of authority<sup>39</sup> summarised in the following words from *Multi-Span Constructions No 1 Pty Ltd v 14 Portland Street Pty Ltd*:<sup>40</sup>

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<sup>35</sup> [2004] TASSC 77; BC200404615. The cases being: *Hooper v Australia and New Zealand Banking Group Ltd* (1996) 5 Tas R 398; *Dean v Dean* [1999] TASSC 15; *Queensland Estates Pty Ltd v Co-Ownership Land Development Pty Ltd* [1969] Qd R 150; *Elliott v Blanchard* (1970) 17 FLR 7; *Re The Victorian Farmers' Loan and Agency Co Ltd* (1897) 22 VLR 629; *Veloudos v Young* (1981) 56 FLR 182; *Porter v McDonald* [1984] WAR 271. See also *Andel Pty Ltd v Century Car Care Pty Ltd* (1989) Q ConvR 54-315, 58,333; *In the Marriage of Stevens* (1991) 15 FamLR 51, 53; *Hayes v O'Sullivan* (2001) 24 WAR 40.

<sup>36</sup> *Hooper v Australia and New Zealand Banking Group Ltd* (1996) 5 Tas R 398, 404.

<sup>37</sup> (1907) 26 NZLR 294.

<sup>38</sup> [2004] TASSC 77, [73]-[81].

<sup>39</sup> Cases such as *Midwarren Estates Pty Ltd v Retek* [1975] VR 575; *Depsun Pty Ltd v Tahore Holdings Pty Ltd* (1990) ANZ ConvR 334; *Multi-Span v Portland* [2001] NSWSC 696, BC200104865; *Professional Services of Australia Pty Ltd v Mila Properties Pty Ltd* [2004] WASC 30; *Goodwin v Gilbert* [2000] WASC 309; *New Zealand Mortgage Guarantee Co Ltd v Pye* [1979] 2 NZLR 188. See also *Hanson Construction Materials Pty Ltd v Vimwise Civil Engineering Pty Ltd* (2005) 12 BPR 23,355; *Circuit Finance Pty Ltd v Crown & Gleeson Securities Pty Ltd* (2006) NSW ConvR 56-143; *Mellish v Fetoza Pty Ltd* [2007] NSWSC 790.

<sup>40</sup> [2001] NSWSC 696; BC2000104865, [127].

A caveat is not an ambulatory or flexible means of maintaining a blocking position in aid of whatever interest, if any, the caveator may have from time to time...The ineffectiveness of a caveat to do more than provide protection, by way of notice, commensurate with the extent of the notified estate or interest is emphasised in decided cases and which are of long standing and are discussed by John Baalman in 'The Drafting of Caveats', (1957) 31 ALR 17. It is beside the point that the caveator may have some estate or interest capable of supporting a caveat which is not itself claimed in the caveat. This is borne out by the following statement in *Ruptash v Zawick* (1956) 2 DLR 145 quoted by Baalman :

The purpose of filing a caveat is to give notice of what is claimed by the caveat against the land described. If an unregistered document in fact gives a party thereto more rights than one in a parcel of land and such a party sees fit to file a caveat claiming one only of such rights, it appears to me that any person proposing to deal with the land is entitled to assume that the claim expressed is the only one made. Expressio unius et exclusio alterius.<sup>41</sup>

Butt<sup>42</sup> attempts to rationalise these two conflicting positions by suggesting that where the caveat merely misdescribes the interest claimed, amendment of the caveat can occur. However, where the caveat discloses no caveatable interest, even though the caveator may have one, amendment of the dealing is not possible. The authorities,<sup>43</sup> which that learned author admits,<sup>44</sup> do not support such a distinction.

With this ambiguity as to whether a defective caveat can be amended, the discretion utilised by a court in deciding whether to allow a non-compliant caveat to remain against title becomes critical. If the resolution is that the power to amend is restricted, and that defects cannot be overlooked, a person lodging a caveat that fails to meet the specific jurisdictional technical requirements may find, at a subsequent and no doubt inconvenient time, that the caveat has been ineffective. To overcome this, NSW has legislatively provided in s 74L of the *Real Property Act 1900* (NSW) that:

...If in any legal proceedings a question arises as to the validity of a caveat lodged under a provision of this Part, the court shall disregard any failure of the caveator to comply strictly with the requirements of this Part, and of any

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<sup>41</sup> The Latin translates to: 'The express mention of one thing excludes all others.'

<sup>42</sup> P Butt, *Land Law*, 5<sup>th</sup> edition, LawBook Co, Prymont, 2006, 749.

<sup>43</sup> See *Kang v Kwan* [2001] NSWSC 624; *Deabel v V'Landys* [2002] NSWSC 438; *Jones v Baker* (2002) 10 BPR 19,115.

<sup>44</sup> P Butt, above n 42.

regulations made for the purposes of this Part, with respect to the form of the caveat.

Despite this direction, NSW authorities display no consistency as to the operational breadth of the provision. For example in *Windella (NSW) Pty Ltd v Hughes and Others*<sup>45</sup> Santow J., in applying the decisions of *Beca Developments Pty Ltd v Idameneo (No 92) Pty Ltd*<sup>46</sup> and *In Marriage of Stevens*<sup>47</sup> was of the view that s 74L was not to be restricted to the curing of technical defects, and that with s 74L operative, there was no necessity for the relodging of the caveat with the non-compliant parts omitted or substituted.<sup>48</sup> By contrast, Palmer J in *FTFS Holdings Pty Ltd v Business Acquisitions Australia Pty Ltd*<sup>49</sup> considered that s 74L could not be used where the caveat failed to address the very nature or type of the estate or interest claimed. Similarly, Gzell J in an ex tempore judgement, *Sama Zaraah Pty Ltd v 888 Projects Pty Ltd* stated that: '[Section 74L] only applies to defects of form and does not deal with matters of substance. It does not empower the court to amend the provisions defining the interest claimed.'<sup>50</sup> However, this again can be compared with the earlier decision of Austin J. in *Deabel v VLandys*<sup>51</sup> where his Honour noted that: 'The court usually exercises its power in the light of s 74L, so as to give effect to the caveat if the caveator has a caveatable interest, despite even gross defects such as the failure to state the interest being protected or even the failure to state the maximum amount secured by the mortgage.'

In summary, no practitioner in New South Wales could be confident that the provisions of s 74L of the *Real Property Act 1900* would rescue a poorly drafted caveat. With the regulations imposing detailed requirements as to the form and content, and the Registrar-General having a duty to ensure that a caveat complies with the legislation, 'as a practical matter, caveators should attempt to comply with the requirements...'<sup>52</sup>

No other jurisdiction has a similar legislative direction to ignore defects in caveats. Rather, what we see is the Bench relying on its general discretionary powers to make

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<sup>45</sup> (1999) 49 NSWLR 158.

<sup>46</sup> (1990) 21 NSWLR 459.

<sup>47</sup> (1991) 105 FLR 459.

<sup>48</sup> (1999) 49 NSWLR 158, [27]-[28].

<sup>49</sup> (2006) 12 BPR 23, 517.

<sup>50</sup> *Sama Zaraah Pty Ltd v 888 Projects Pty Ltd* [2007] NSWSC 1041.

<sup>51</sup> *Deabel v V'Landys* [2002] NSWSC 438; BC200203496, [8]; citing Young CJ in *Jones v Baker* (2002) 10 BPR 19,115.

<sup>52</sup> P Butt, *Land Law*, 5<sup>th</sup> edition, Thomson LawBook Co, Prymont, NSW, 2006, 741-742.

any order that it sees fit (a legislative direction available in all jurisdictions),<sup>53</sup> or, as was done in Western Australia, reliance on interlocutory injunctive relief to provide analogous remedial relief.<sup>54</sup> For example in *Connector Park Pty Ltd v RV Pty Ltd*<sup>55</sup> Crawford J. considered that even if there were drafting difficulties with the caveat, there was no doubt that the respondent did have a caveatable interest and that technical deficiencies in the form and content of the caveat would not be allowed to deprive a good faith claimant from the benefits of protection provided by the caveating system.<sup>56</sup>

## V Where to From Here

The question remains, and if integrity of the register is placed at the forefront, as I suggest it should, which approach, if any achieves this aim. The caveat provisions have undoubtedly played a critical role in the history of Torrens legislation. Alongside indefeasibility, they are probably the most discussed area, and would represent, in pure numbers, the most litigated part of Torrens legislation. However, there is no doubt that at a practical level, abuse of the use of caveats occurs, and any unrestrained freedom to lodge capricious caveats can only exacerbate that abuse.<sup>57</sup> Perhaps it is this practical reason, as much as slavish adherence to the prescriptive requirements of the legislation that has led to, for the most part, a strict compliance-

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<sup>53</sup> *Land Titles Act 1980* (Tas) s 135(2). All other jurisdictions also have a similar broad power, see *Transfer of Land Act 1958* (Vic), s 89A(7); *Real Property Act 1900* (NSW) s 74MA; *Land Title Act 1994* (Qld) s 127(2); *Real Property Act 1886* (SA) s 191(e); *Transfer of Land Act 1893* (WA) s 138(c); *Land Titles Act 1925* (ACT) s 107; *Land Title Act* (NT) s 143.

<sup>54</sup> *Midland Brick Company Pty Ltd v Welsh* [2006] 32 WAR 287, [417]. 'I am of the view that in circumstances where the statutory procedure to protect an unregistered equitable interests in the subject land may not be sufficient to protect that interest owing to a defect in the form of the caveat a restraining order by way of injunction should be made in favour of Midland Brick as a means of holding the defendant to what I have found to be her bargain.'

<sup>55</sup> [2006] TASSC 9. See also *Hooper v Australian and New Zealand Banking Group Ltd* (1996) 5 Tas R 398; ANZ ConvR 400.

<sup>56</sup> Applying the earlier decision of *Hooper v Australia and New Zealand Banking Group Ltd* (1996) 5 Tas R 398. See also *Four Oak Enterprises Pty Ltd v Clark* [2002] ANZ ConvR 440.

<sup>57</sup> L Aitken, 'Many shabby manoeuvres – the use and abuse of caveats in theory and practice', (2005) *ABR Lexis* 16, 3 of online version: A caveat, capiously or capriciously lodged, permits the person lodging it to wring the withers of the registered proprietor with a claim which ultimately proves baseless. It will necessarily take time, effort and expense to remove the caveat; once removed, there may be little to recover by way of damages for the loss sustained while there was a blot on the title.'

orientated approach to the caveat provisions. Perhaps it may also hark to a concern about the operation of unregistered or equitable interests in a system of title by registration.

It must be said that equity embodies the Aristotelian ideal that the law must be rectified where it falls short by reason of its universality. From this, it can be seen that there is an instant philosophical and practical tension between the Torrens system's universality and equity's specificity....Equitable interests cannot be discovered by looking at the register (unless a caveat has been lodged). Therefore, equitable interests undermine the conclusiveness of the register because the 'mirror' of title can no longer provide an accurate reflection if there are interests which cannot be recorded.<sup>58</sup>

Given this, and with an appreciation that equitable interests have prospered, rather than fallen into disuse, the time for equity and Torrens to find some form of homology has arrived. Perhaps *Black v Garnock* is the beginning of this, the failure to caveat arguably now elevated to the stature of professional negligence, and the inherently practical effect of notice to someone searching now recognised. With caveats for the most part operating as the singular mechanism to warn of the presence of an unregistered interest, the line of authority suggesting that the function of a caveat is *only* to protect the interest holder, must now come into question.<sup>59</sup> Contemporary thinking may well see the purpose of a caveat as a means to prevent dealing with the land by the registered proprietor in a manner that is inconsistent with the rights of the caveator. As noted by Hughson, Neave and O'Connor, this approach is preferable:

It emphasises the protective function of the caveat procedure, and allows any kind of proprietary interest to be caveated. It also allows a caveat to fulfil different functions depending upon the circumstances. Thus, the caveator might proceed to litigation if appropriate in the circumstances, or the caveator might be required to lodge a registrable instrument, or the caveat might be allowed to remain on the register indefinitely to protect it from being overridden by registration.<sup>60</sup>

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<sup>58</sup> K Barnett, 'The mirror of title crack'd from side to side? The amazing half-life of the equitable mortgage', (2007) APLJ Lexis 4, p 4 of online version.

<sup>59</sup> *Jacobs v Platt Nominees* [1990] VR 146; *Avco Financial Services Ltd v Fishman* [1993] 1 VR 90; *J & H Just Holdings Pty Ltd v Bank of New South Wales* (1971) 125 CLR 546; *Person to Person Financial Services v Sharari* [1984] 1 NSWLR 745.

<sup>60</sup> M A Hughson, M Neave and P O'Connor, 'Reflections on the Mirror of Title: Resolving the Conflict between Purchasers and Prior Interest Holders', (1997) 21 *Melbourne Uni L R* 460, 465.



*Black v Garnock* may also have more far-reaching effects. The line of authority<sup>61</sup> that suggests that the equitable interest created first in time will prevail over a later created equitable interest, despite a failure to caveat, must now be questioned. There are of course, obvious dangers with this. Equitable interests under the Torrens system arise out of two mechanisms. The first deriving from agreement between the parties, such as equitable mortgages<sup>62</sup> and equitable leases<sup>63</sup> for which it may be expected that caveats could be lodged in protection.<sup>64</sup> The second category deriving from operation of law, and which sees the recipient unaware of any proprietary interest until resolution by the Court – these, for example, resulting out of unconscionable conduct<sup>65</sup> or equitable estoppel.<sup>66</sup> In addition to this, if the role of caveating is now more significant, the next question becomes the exercise of the discretion by the judiciary. If the significance is raised, does this serve as a message that more caution should be exercised in the drafting and acceptance of caveats, or will the compensation provisions existing in a number of jurisdictions be used to stamp out vexatious and frivolous additions to the register.<sup>67</sup> If greater caution is to be used, should the discretion be exercised as with a statutory provision in New South Wales, or by reliance on the inherent discretionary powers to make any order the court sees fit. Another alternative may be to use the analogous precedent offered by the voluminous litigation on the power of a court to order the removal or extension of a caveat – this asking whether there a serious question to be tried and determining where the balance of convenience lies.<sup>68</sup> It is submitted that the approach

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<sup>61</sup> For some of the case law on this issue, see *J & H Just Holdings Pty Ltd v Bank of New South Wales* (1971) 125 CLR 546; *Australian Guarantee Corp (NZ) Ltd v CFC Commercial Finance Ltd* [1995] 1 NZLR 129; *Double Bay Newspapers Pty Ltd v AW Holdings Pty Ltd* (1996) 7 BR 14,858; *Abigail v Lapin* [1934] AC 491; *Heid v Reliance Finance Corporation Pty Ltd* (183) 154 CLR 326.

<sup>62</sup> *ANZ Banking Group Ltd v Widin* (1990) 26 FCR 21; 102 ALR 289.

<sup>63</sup> *Chan v Cresdon Pty Ltd* (1989) 168 CLR 242; 89 ALR 522.

<sup>64</sup> See Barnett, above n 58, p21 where similar comments are made.

<sup>65</sup> *Baumgartner v Baumgartner* (1987) 164 CLR 137.

<sup>66</sup> *Walton Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

<sup>67</sup> *Transfer of Land Act 1958* (Vic), s 118; *Real Property Act 1900* (NSW) s 74P; *Land Title Act 1994* (Qld) s 130; *Real Property Act 1886* (SA) s 191(j); *Transfer of Land Act 1893* (WA) s 140; *Land Titles Act 1980* (Tas) s 138; *Land Titles Act 1925* (ACT) s 108; *Land Title Act* (NT) s 146.

<sup>68</sup> There is a huge range of litigation on this topic pertaining to the decision to remove or extend a caveat. Just some of the recent authority to discuss this are as follows: (NSW): *Antar v Fairchild Development Pty Ltd (recs and mgrs apptd) (in liq)* [2008] NSWSC 638; *Country Law Services Pty Ltd v Duff* [2007] NSWSC 1509; *Buchanan v Crown & Gleeson Business Finance Pty Ltd* [2007] 13 BPR 2, 513, NSW ConvR 56-173; (Vic) *Graham v Gameday Enterprises Pty Ltd* [2008] VSC 140; *S & D International Pty Ltd v Malhotra* [2006] VSC 280; *Sarandal Pty Ltd v Nameplan Pty Ltd* [2007] VSC 568; *Riverview Projects Pty Ltd v Ellera*

in New South Wales has much to favour it. The establishment of a specific legislative power to ignore irregularities expressly allows a basis on which to permit a claim to remain known and sees the Register becoming closer to the ideal of a mirror or photo of the title. This legislative power, combined with a stated framework for analysis, could include the following criteria (with these criteria developed from established authority on comparable areas (such as the power to extend a valid caveat):

- (i) The strength of the claim of the caveator;<sup>69</sup>
- (ii) The availability of an alternative remedy for the caveator;<sup>70</sup>
- (iii) That the caveat is being lodged in good faith and not for an ulterior purpose – for example in the Victorian decision of *Goldstraw v Goldstraw*<sup>71</sup> counsel conceded that the caveat was lodged as a ‘practical and well used method in order to get something to the bargaining table.’<sup>72</sup> The response of Dodds-Streton J was that such a practice ‘would undermine the operation of an essential feature of the Torrens system’;<sup>73</sup>
- (iv) The consequences for the registered proprietor, and whether there is some other mechanism by which the economic value of the caveator’s interest can be protected (e.g. payment into court);<sup>74</sup>
- (v) Compensation linked to improper lodgement.<sup>75</sup>

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[2007] V ConvR 54-738; *Aircon Heating and Airconditioning Pty Ltd (in liq) v Crane Distribution Ltd* [2006] V ConvR 54-179; (Qld) *AB v IJ* [2008] QSC 046; BC200801470; *Landlush Pty Ltd v Rutherford* [2003] 1 Qd R 236; *Global Capital Industries Pty Ltd v Dela Property Developments Pty Ltd* [2006] 1 Qd R 501; *Jedhar Pty Ltd v Grosse* [2004] Q ConvR 54-606; (WA) *D&M (Australia) Pty Ltd v Crouch Developments Pty Ltd* [2008] WASC 160; *McGiveron v Stanton-Bovis* [2007] WASC 240; BC200709171; *Police and Nurses Credit Society Ltd v Weber* [2003] 1 BFRA 21. See S Jackson, ‘Removal of a Caveat – How Convenient’, (1996) APLJ Lexis 5.

<sup>69</sup> *Country Law Services Pty Ltd v Duff* [2007] NSWSC 1509; *Union Finance Pty Ltd v Rateki Pty Ltd (No 2)* [2007] SASC 11; BC200700253.

<sup>70</sup> *D&M (Australia) Pty Ltd v Crouch Developments Pty Ltd* [2008] WASC 160.

<sup>71</sup> [2002] VSC 491; BC200208479.

<sup>72</sup> [2002] VSC 491, [36].

<sup>73</sup> [2002] VSC 491, [42].

<sup>74</sup> *D&M (Australia) Pty Ltd v Crouch Developments Pty Ltd* [2008] WASC 160; *Marinkovic v Pat McGrath Engineering Pty Ltd* (2004) 61 NSWLR 150; *Jean-Pierre Cosmetics Pty Ltd v Garrty Trustweel & Associates Pty Ltd* (1994) 6 BPR 13, 497; *Australian Security Estates Pty Ltd v Bluecrest Holdings Pty Ltd* (1999) 9 BPR 17,533.

<sup>75</sup> All jurisdictions presently provide for this: see (ACT) *Land Titles Act 1925*, s 30(3); (NT) *Land Title Act 2000*, s 146; (NSW) *Real Property Act 1900*, s 74P; (Qld) *Land Title Act 1994*, s

By this legislative mechanism and common law reflection on the stated criteria, a body of law would quickly formulate the parameters around the lodging of caveats. Practitioners would have a better understanding and appreciation of when caveating could occur and the litigation that currently surrounds unregistered interests may well be reduced.

## VI Conclusion

The unregistered interest continues to bedevil the Torrens system. It appears as though we have traveled too far to adopt the original idea of Torrens that there be a reduction in the quality of equitable interests to a mere contractual or personal right.<sup>76</sup> Indeed once Sir Robert Torrens became Registrar-General, it appeared as though he even recognised that equitable interests may well exist, and be protected by, for example, possession of the certificate of title.<sup>77</sup> Many suggestions have been made for reform, with perhaps the most notable being the Canadian model of recording the interest with priority determined by time of recording,<sup>78</sup> based on the Registration of Deeds legislation.<sup>79</sup> McEniery also suggests that there be a dedicated means of giving notice of the existence of an unregistered interest – simpler, cheaper, and more easily compliant than the caveat mechanism.<sup>80</sup> However, these ideas, worthy as they are of consideration, involve more fundamental changes to the Torrens system and perhaps with the mooted introduction of the National Electronic

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130; (SA) *Real Property Act 1886*, s 44; (Tas) *Land Titles Act 1980*, s 138; (Vic) *Transfer of Land Act 1958*, s 118; (WA) *Transfer of Land Act 1893*, s 140.

<sup>76</sup> See the comments by M A Hughson, M Neave and P O'Connor, 'Reflections on the Mirror of Title: Resolving the Conflict between Purchasers and Prior Interest Holders', (1997) 21 *MULR* 460, 461.

<sup>77</sup> South Australian Parliamentary Papers 1858, No 161, p3; South Australian Parliamentary Papers 1859 No 151, p5; South Australian Parliamentary Papers 1860, p4, cited in Barnett, above n 58, fn 27.

<sup>78</sup> See L McCrimmon, 'Protection of Equitable Interests under the Torrens System: Polishing the Mirror of Title', (1994) 20 *Mon. LR*. 300.

<sup>79</sup> Eg *Conveyancing Act 1919* (NSW); *Property Law Act 1974* (Qld); *Registration of Deeds Act 1935* (SA); *Registration of Deeds Act 1935* (Tas); *Property Law Act 1858* (Vic); *Registration of Deeds Act 1856* (WA); *Registration of Deeds Act 1957* (ACT).

<sup>80</sup> B McEniery, 'A Dedicated Means of Giving Notice of the Existence of Unregistered Interests under Torrens', (2006) 12(3) *APLJ* 244.

Conveyancing System in 2010<sup>81</sup> the time may be opportune for a national approach to the substantive law. Prior to this nevertheless, the suggestion is that the taking of the following steps would reduce the complexity, cost and litigation surrounding the unregistered interest in the Torrens system of land registration – all of which do not involve a significant departure from what presently occurs.

- (i) All jurisdictions should include the use of settlement<sup>82</sup> or priority notices<sup>83</sup> to preserve the place in the queue for the unregistered interest pending a standard settlement. This method of protection is considerably cheaper and easier to initiate than a caveat;
- (ii) The lodging of a caveat should be recognised as the giving of notice to the world of an unregistered interest;
- (iii) To support the importance of the caveat, the establishment within legislation of a rebuttable presumption that would see the failure to lodge a caveat as leading to loss of priority.<sup>84</sup> The judiciary would have the opportunity to craft the limited circumstances in which the failure to lodge would lead to a loss of priority (such as the exceptional factual considerations in *Jacobs v Platt Nominees*<sup>85</sup>, where the proprietary interest arises by operation of law, and an exception for fraud) make it understandable that no caveat would be lodged;
- (iv) That there should be an express legislative direction, based on stated criteria to allow judges to ignore defects in the drafting of caveats. Uniformity between jurisdictions would allow the quick establishment of a depth of authority as to how these provisions would operate.

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<sup>81</sup> See [www.necs.gov.au](http://www.necs.gov.au).

<sup>82</sup> *Land Title Act 1994* (Qld), ss 138-152.

<sup>83</sup> *Land Titles Act 1980* (Tas), s 52.

<sup>84</sup> This idea is not new. In 1989 the Victorian Law Reform Commission recommended that caveats should determine priority. See Victorian Law Reform Commission, *Priorities*, Report No 22 (1989). See also M A Hughson, M Neave and P O'Connor, *Reflections on the Mirror of Title: Resolving the Conflict between Purchasers and Prior Interest Holders*, (1997) 21 *Melbourne ULR* 460, 482-489.

<sup>85</sup> [1990] VR 146. The failure to lodge a caveat did not lead to a loss of priority as the daughter in that case thought that her interests would be protected by her mother (who would need to sign off on any changes), the fact that she did not want to upset the relationship with her father, and she had no reason to believe that a fraud would occur involving the sale of the land to another party. Contrast *Mimi v Millenium Developments Pty Ltd* [2004] V ConvR 54-687.

Perhaps the argument as to whether land law or equitable principles should prevail has become passé. In this age of supposed cooperative federalism, we should no longer look to see who occupies the higher position, but whether Torrens and equitable principles can marry and consummate that relationship in the spirit of mutual respect that arguably fusion of law and equity was intended to deliver.

# Identity Fraud and Land Registration Systems: An Australian Perspective

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## Introduction

The verification of identity of the parties to land transactions stands as a bulwark against rampant abuse and an undermining of the integrity of the conveyancing system. After all, it is that connection between the conveyancing system, the need to identify the parties to the transaction and the all too easy theft of one's soul (be it through credit card manipulation, the stealing of documents that verify identity, the openness of social networking sites, the possession of the certificate of title and the simple lack of knowledge and carelessness of the consumer in knowing how to protect their reputation) that provides the avenue by which one person can assume to be another? In the context of land transactions, this can easily lead mortgagees forwarding finance to a fraudster, the innocent registered proprietor unaware this is occurring. Because of this the more steps that can be put in place to ensure that the parties to the transaction are the people who they say they are, without compromising the efficiency of the system, can only lead to greater reliance, understanding and confidence—a confidence that we are now seeing questioned in the populist media in Australia and the Parliament of England.<sup>1</sup> Furthermore, with a State guaranteed compensation scheme in place to compensate those who suffer loss, the purse of the public is protected by a system that takes the necessary steps to minimise fraud. As noted by Matthews, it is “laughably simple”<sup>2</sup> the way in which frauds can occur. What this paper does is examine what steps are currently required for identity verification in the context of land transactions, (particularly in the context of a mortgagee lending money based on a representation that the person seeking the finance is the fee simple owner of the property), and as we move inexorably towards a fully electronic system for conveyancing,<sup>3</sup> what steps should be incorporated in this future model. The need for this examination cannot be doubted.

\* Thanks for the comments and insights from Simon Libbis and Ann Kinnear from the National Electronic Conveyancing office and Max Locke (Registrar of Titles, Queensland). Appreciation is also expressed to an anonymous referee. Your thoughts have improved the article, and for this the authors are appreciative.

<sup>1</sup> For example in Australia on December 30, 2009, a story aired on *Today Tonight*, highlighting how land could be sold, or mortgaged to strangers, without the consent or knowledge of the true owner. Recently a scammer has been able to sell a property in Perth, Western Australia—the true owner being overseas at the time of the sale. See “Scammer sells home in Perth”, [www.creditcrunch.co.uk/forum/index.php?showtopic=7064](http://www.creditcrunch.co.uk/forum/index.php?showtopic=7064) [Accessed September 28, 2010].

<sup>2</sup> P. Matthews, “Registered land, fraud and human rights”, (2008) 124 *Law Quarterly Review* 351, 351.

<sup>3</sup> See generally <http://www.necs.gov.au> [Accessed July 5, 2011] (National Electronic Conveyancing System) for an overview of the current process and timetable for implementation (at March 25, 2010).

“The intended move to an electronic business environment for conveyancing represents the most significant change in industry practices over the last 150 years ... The most significant change from the land standing paper-based conveyancing arrangements ... is the shift from transacting parties signing the instruments necessary to effect changes in each jurisdiction’s ... Register to an appointed agent signing on the transacting party’s behalf. The signing, by a legal or conveyancing practice or practitioner, on the transacting party’s behalf will necessarily require the *transacting party’s identity to be verified*.”<sup>4</sup> (Emphasis supplied.)

Whilst the focus of this paper is on land, readers would be aware that any discussion of remedial responses for identity fraud<sup>5</sup> arises in the wider context that this problem can equally occur outside the milieu of land transactions. However, there is also no doubt that a significant portion of the billion-dollar fraud that occurs relates to land transactions.<sup>6</sup> As transactions are undertaken in cyberspace, “new opportunities arise for people within organisations as well as for external customers to misrepresent themselves and to manipulate electronic transactions for gain”.<sup>7</sup>

<sup>4</sup> *NECS Request for Tender, CIV Standard and Application Procedures Development for NECS*, January 22, 2010, 2.8–2.9.

<sup>5</sup> The literature on identity fraud in Australia and overseas has used the terms “identity fraud” and “identity theft” interchangeably. There does not seem to be a standardised definition for these terms: see S. Sproule and N. Archer, “Defining identity theft” (2007) Eighth World Congress on the Management of eBusiness and ACPR, Standardisation of definitions of identity crime terms: A step towards consistency, Report Series No.145.3, 2006, 5. This paper will use the definition from Model Criminal Law Officers’ Committee of the Standing Committee of the Attorneys-General (Final Report: *Identity Crime*, 2008) which define the terms “identity crime”, “identity fraud” and “identity theft” as follows: “Identity crime is a generic term to describe activities/offences in which a perpetrator uses a fabricated identity, a manipulated identity, or a stolen/assumed identity to facilitate the commission of crime. Identity fraud is the gaining of money, goods, services, or other benefits or the avoidance of obligations through the use of a fabricated identity, a manipulated identity, or a stolen/assumed identity. Identity theft is the theft or assumption of a pre-existing identity (or a significant part thereof), with or without consent, and whether, in the case of an individual, the person is living or deceased”: at p.8.

<sup>6</sup> R. Graycar and R. Smith, “Identifying and Responding to Electronic Fraud Risks”, 30th Australasian Registrars’ Conference, Canberra, November 13, 2002, p.1.

<sup>7</sup> R. Low, “Maintaining the integrity of the Torrens system in a digital environment: a comparative overview of the safeguards used within the electronic land systems in Canada, New Zealand, United Kingdom and Singapore”, (2005) 11 *Australian Property Law Journal* 155, 167 quoting from Graycar and Smith, “Identifying and Responding to Electronic Fraud Risks”, 30th Australasian Registrars’ Conference, Canberra, November 13, 2002. The Australian Government has also prepared a kit to prevent identity theft: Australian Government, National Crime Prevention, *A kit to Prevent and Respond to Identity Theft*, ISBN: 0 642 21084 5. Losses in Australia are estimated to be AU \$3.5 billion per year: M. Rannard, “Identity Theft is increasing—survey”, *Sydney Morning Herald*, June 3, 2009, <http://news.smh.com.au> June 5, 2009 [Accessed July 6, 2011]. The author was quoting from *Identity Theft Report* conducted by Galaxy Research, which found that 4.4 million Australians had been affected by identity theft in the last year. If these figures are accurate, the escalating cost of this crime can be evidenced by a comparison with the work of AUSTRAC, which, some six years earlier estimated that identity theft cost Australia AU \$1.1 billion. See Australian Government, National Crime Prevention, *A kit to Prevent and Respond to Identity Theft*, ISBN: 0 642 21084 5. “Some estimates in 2002 put the number of identity theft victims at close to 10 million, an 81% rise from 2001 and at a cost of nearly US\$53 billion.” Wenjie Wang, Yufei Yuan and Norm Archer, “A contextual framework for combating identity theft”, (2006). (March/April) IEEE Security and Privacy 30, 30. See also Model Criminal Law Officers’ Committee of the Standing Committee of Attorneys-General, *Final Report Identity Crime*, (March 2008), 9–10. The rise in the use of smartphones has also led to new concerns about identity theft: MCT, “Smartphones offer new frontier for identity theft”, <http://www.theage.com.au> [Accessed July 6, 2011].

## How can identity fraud in land transactions be perpetrated?

As numerous Australian cases<sup>8</sup> illustrate, the way in which identity fraud can occur in relation to land is all too simple. For example in *Grgic v ANZ Banking Group Ltd*,<sup>9</sup> the father, the registered proprietor of land, had refused to provide a guarantee for his son's business. The son, aggrieved by this, set about on a course of action whereby the son, his wife, and a person impersonating his father was introduced to the bank manager. They had possession of the certificate of title. The mortgage was prepared with imposter signing the relevant documents and appearing as if he was the father. The monies were then advanced, the fraud possible because of the bank failing to check the identity of the imposter, the reliance by the bank on the possession of the certificate of title as a safeguard against identity fraud, and the relationship between the parties allowing the son to have possession of the certificate of title. A very similar scenario occurred in *Ratcliffe v Watters*,<sup>10</sup> where the daughter of the registered proprietor, in possession of the certificate of title, saw a solicitor, accompanied by an imposter represented by the daughter, to be her father. The solicitor, in this instance, prepared to witness the contract of sale and memorandum of transfer—the possession of the certificate of title and the relationship between the parties critical to the committing of the fraud.

Whilst the above examples came about through the familial relationship and easy access to title documents, *Challenger Managed Investments Ltd v Direct Money Corporation Pty Ltd*<sup>11</sup> illustrates how fraud may occur without possession of a certificate of title, or a pre-existing relationship to the victim. The imposter in this instance made application for a new certificate of title, based on the loss of the previous certificate. A cyclone was alleged to be the cause of the loss of the certificate. This application was supported by statutory declarations. The Land Titles Office issued new certificates of title with these being used to obtain a loan.

What these cases highlight is the ease in which identity fraud can occur, and perhaps given this, it is surprising that more is not made of the lack of safeguards. However, with the impending dawn of a new era based on technology which few will technically understand, a failure to put in place nationally consistent safeguards for identity verification will, as noted, only serve to undermine a land registration process that serves the vast majority of transactions exceptionally well. In Australia total land sales yearly exceed AU \$240 billion, with this approximating 26 per cent of gross domestic product, mortgages of some AU \$790 billion, and the total value of real estate in this country estimated at AU \$3.4 trillion, a failure to put in place the necessary measures to protect the revenue of the Crown and the underlying economics of demand and supply could have disastrous consequences for the wider economy.<sup>12</sup> Furthermore, as Matthews notes, the public nature of the land registry and the opportunities it presents for fraud could potentially be seen as a violation

<sup>8</sup> See generally, Rouhshi Low, "The use of technology to automate the registration process within the Torrens System and its impact on fraud: an analysis", unpublished PhD thesis, Queensland University of Technology, 2008, 86–90, and Rouhshi Low, "Opportunities for fraud in the proposed national electronic conveyancing system: fact or fiction?" (2006) 13(2) *Murdoch University Electronic Journal of Law* 225.

<sup>9</sup> *Grgic v ANZ Banking Group Ltd* (1994) 33 N.S.W.L.R. 202.

<sup>10</sup> *Ratcliffe v Watters* (1969) 89 W.N. (Pt. 1) (NSW) 497.

<sup>11</sup> *Challenger Managed Investments Ltd v Direct Money Corporation Pty Ltd* (2003) 59 N.S.W.L.R. 452.

<sup>12</sup> These figures represent the estimates in 2005/2006. *NECS Request for Tender, CIV Standard and Application Procedures Development for NECS*, January 22, 2010, 2.2. Intuitively, today the sums may be considerably greater.



of human rights.<sup>13</sup> These factors, with the additional recognition that consumers (such as purchasers of real estate) overstate the probability of something tragic occurring, even when objectively of a low probability,<sup>14</sup> and the comprehension that whilst the risk of identity fraud is of a low probability it is nonetheless material,<sup>15</sup> the key question is what safeguards are available, and what should be available to protect what many see as an inherent part of the culture of many jurisdictions—that of home ownership. With this background in mind, this paper will be structured as follows. Part one will consider just how loss and risk should be allocated in consumer land transactions generally—where should the responsibility lie when one’s identity is taken. Three major principles inform this debate—how should the loss be spread, how should it be reduced and how should it be imposed? Part two will examine just what is identity fraud, its prevalence in land transactions and contrasting how it occurs in the traditional paper based environment, with what will likely happen in an electronic environment. Part three will assess the risk associated with the activity of land transactions and identity fraud and provide an overview of the current legislative and regulatory responses to prevent it occurring. Part four will use the elements discussed in Parts one to three to discuss loss allocation in an electronic environment for land transactions.

## Part one: loss allocation in identity fraud cases

“Cassio: Reputation, reputation, reputation, O, I have lost my reputation! I have lost the immortal part of myself, and what remains is bestial.

Iago: “Reputation is an idle and most false imposition: oft got without merit, and lost without deserving.”<sup>16</sup>

There is no doubt that whilst many would see loss of reputation and identity as a modern phenomenon brought about by the rise of the internet, the complexity of modern lives and ready access to the personal information of others, the lament by Cassio in Shakespeare’s *Othello* demonstrates the issue has a long lineage. Indeed, it must be remembered that the better-known quote of Iago was said in the context of this man seeking to destroy the reputation and identity of Othello. Today, we understandably value our reputation or identity, and with modern means allowing this to be destroyed silently, covertly, from afar, and from enemies close at hand, the necessity to guard against loss of identity is all the more apparent. However, it cannot be over-emphasised—no system exists which will eliminate fraud. With this in mind, the question is one of how to deal with and minimise the risk, and allocate the loss when something does go awry. The starting points for this analysis are the three major principles behind economic efficiency and the allocation of loss in cases of forgery. These are loss spreading, loss reduction and loss imposition.<sup>17</sup>

<sup>13</sup> Matthews, “Registered land, fraud and human rights”, (2008) 124 *Law Quarterly Review* 351, 351.

<sup>14</sup> See the discussion of behavioural economics on consumer policy in Productivity Commission, *Review of Australia’s Consumer Policy Framework*, Final Report, Canberra, 2008, Appendix B.

<sup>15</sup> Clayton Utz, “Risk assessment of the National Electronic Conveyancing System”, Final Report to the National Steering Committee, February 9, 2007, 26.

<sup>16</sup> William Shakespeare, *Othello* Act 11, Scene 3, lines 256–265 (cited from *The Complete Works of William Shakespeare*, (Cambridge: Cambridge University Press, 1982), p.912).

<sup>17</sup> The seminal article on this is Robert D. Cooter and Edward L. Rubin, “A theory of loss allocation for consumer payments” (1987–1988) 66 *Texas Law Review* 63.

### *Loss spreading*

Consumers are traditionally regarded as loss averse. This is the reason we insure. Even though the loss of property through a bushfire may be small, the consequences are so catastrophic that we will take precautions to protect against this. In so doing, the premiums payable will exceed the expected claims—if they did not, insurance companies would quickly become insolvent. Loss spreading allows the consumer to pass that risk onto another person where that risk can be spread by the insurance company over a larger group of people. Both parties are then in a position to beneficially exchange from that arrangement. A common example will highlight this point. Assume a person has a 1 per cent risk that they will be subject to identity fraud. A risk-averse registered proprietor owning a property worth AU \$1,000,000 will likely pay more than AU \$10,000 (i.e. greater than 1 per cent) to guard against that risk. By contrast, the financial institution or insurer is likely to be risk neutral. It can safely assume that risk at a price of AU \$10,000, and then spread that risk over a large number of homeowners. Therefore, the guiding economics behind loss allocation and loss spreading is that the risk should be borne by the person who can achieve risk neutrality at the lowest level.

“In general, the party that can achieve risk neutrality at the lowest cost is the one that has greater economic resources and is in a position to spread the loss most effectively.”<sup>18</sup>

This is most likely to be the financial institution.

### *Loss reduction*

The second guiding principle is that the party who can guard against the loss most easily should incur that cost—the lowest cost avoider. The legal system must put in place incentives for each party to achieve loss reduction. Whereas loss spreading was predicated on a loss already having occurred, the analysis here is far more complex and must incorporate, by necessity, the intangibles of human behaviour. What reasonably can we expect to do with respect to the owners of land? We currently expect and require owners of debit and credit cards to take precautions to guard against misuse, and provided this occurs, then liability is limited to a minimal amount. Should we impose obligations on owners of land to take steps to protect the certificate of title and minimise the potential for one’s identity to be stolen. Currently in Australia, we see the state jurisdictions of New South Wales and Queensland imposing obligations on mortgagees to verify identity, yet little is imposed on the owners of real estate. Should we? If responsibility and liability is solely imposed on financial institutions, then there is little incentive for homeowners to take steps to take precautions. For example, as noted above in *Grgic* and *Ratcliffe* one reason the fraud was possible was the familial relationship that allowed a person who is not the registered proprietor to obtain access to the certificate of title with this then allowing that fraudster to misrepresent the truth.

<sup>18</sup> Cooter and Rubin, “A theory of loss allocation for consumer payments” (1987–1988) 66 *Texas Law Review* 63, 71.

The question is, if we were to impose greater responsibility on homeowners to protect against misuse of the certificate of title and other identity documents, will their behaviour alter?

“[T]he loss reduction principle is a useful guide for assigning liability only if the supply of precaution or innovation is elastic with respect to liability.”<sup>19</sup>

In other words, requiring homeowners to take precautions will only be of use if the behaviour of those people alters. If it does not, imposing liability makes little sense. For this reason, whereas loss-spreading clearly favoured the imposition of liability on the bank in a land transaction, the result is not as clear for loss reduction. Both financial institution and consumer are in a position to take relatively easy steps to minimise the potential for identity fraud. The financial institution with its capacity to easily undertake identity checks and pass costs associated with this over a great number of people can remove many of the risks associated with this type of forgery. Similarly, the consumer can take greater measures to protect their own identity.

### *Loss imposition*

This principle asks who should enforce or have the loss imposed on them. The clearest solution is to let the loss lie where it occurs. Thus, if a registered proprietor has a mortgage attached to their land by an imposter, the mortgagee should be entitled to enforce that mortgage, even though they may have taken no steps to check identity. The lesson learnt by the landowner would be clear: protect identity. However, this fails to take into consideration that the consumer is less likely than the mortgagee to be in a position to enforce their rights. The financial institution, acting rationally, will take the necessary steps to assert their rights and has a legal incentive to do so given the vast array of like transactions in which they are involved. This is not the case for the registered proprietor, and even more so with consumers that may have limited financial resources to take legal action. Putting these elements together, we see the framework sitting as follows:

Loss Spreading	Onus should be placed on mortgagee—they are risk neutral, whereas most homeowners would be risk-averse. The financial institution can spread the loss over a large group of people at little expense to each.
Loss Reduction	This factor is neutral. Both parties are able to reduce the potential for loss. The bank by taking steps to verify identity, the homeowner utilising precautions to avoid loss of identity. This would suggest that not all liability should be placed on the mortgagee.
Loss Imposition	Financial institutions will have greater access to enforcement mechanisms with it being rational for them to take action to recover loss. Consumers do not have the same opportunity either because of a lack of finance or ignorance of their rights—consumers have less incentive to be appraised of their legal actions.

<sup>19</sup> Cooter and Rubin, “A theory of loss allocation for consumer payments” (1987–1988) 66 *Texas Law Review* 63, 75.

*Putting the elements together*

As noted by the framework, two of three principles favour responsibility on the mortgagee, the third is not clear, and no suggestion is being made that the solution is simply quantitative—that the mathematical formula favours responsibility and liability for loss being imposed on the bank. However, we believe that there is a further consideration that can help resolve the conundrum. Bearing in mind that in Australia, even if the mortgage is forged or would otherwise be invalid due to fraud, the mortgagee, provided it has acted without fraud, will get an indefeasible title,<sup>20</sup> albeit subject to such estates and interests as are already noted on the register: the person who bears the cost of preventing identity fraud should also obtain the benefits of so doing. Accordingly, if costs are imposed on one party, they should receive the benefit of taking those measures. The legislative reforms in New South Wales and Queensland (discussed below) operate on this premise: imposing responsibility for verification on mortgagees. In Queensland and New South Wales, provided that mortgagees follow the legislative guidelines of identity verification, indefeasibility of title is theirs to enjoy. However, this leaves the pivotal question unanswered—what should be the legislative guidelines, that is, what steps should be taken to verify identity, and who should take them? In stating this however, it is important to recall that imposing obligations merely on one party diminishes the incentive on another party to reduce the risk of loss—the problem of moral hazard. We suggest the answer from the perspective discussed in this Part one is as follows: first, the primary responsibility for loss caused by the identity fraud should lie with lender. This institution has the capacity to check identity—if they do not check then the assumption can be made that they would rather bear the loss, than take the costs of additional checks, “[s]ociety should not pay for measures that cost more than the evil they are intended to avoid”.<sup>21</sup> However, this fails to reflect the importance and public confidence necessary for the correct operation of the land registers. For this reason, mandated client identification must be imposed. Secondly, mortgagees have a far greater capacity to spread the loss than do consumers. Presently, each of us could have our identity stolen, though for the vast majority, this will never occur. It is a type of “reverse lottery”.<sup>22</sup> Identity fraud for the individual consumer is devastating—for the financial institution rarely so. The institution can achieve risk neutrality.<sup>23</sup> This is not possible for the individual consumer. It is the mortgagee who should bear the responsibility and the loss associated with identity fraud. By so doing a raft of measures should be put in place to assist the mortgagee to guard against this. In the next section, we further this analysis by developing a taxonomy of identity frauds that can occur in a conveyancing transaction.

<sup>20</sup> For an excellent discussion of the options surrounding indefeasibility, (i.e. whether indefeasibility should be immediate, deferred or discretionary), see Pamela O'Connor, “Deferred and immediate indefeasibility: bijural ambiguity in registered land title systems”, (2009) 13 *Edinburgh Law Review* 194. See also Matthew Harding and Michael Bryan, “Responding to fraud in title registration systems: a comparative study”, in Martin Dixon (ed.), *Modern Studies in Property Law*, (Oxford: Hart Publishing, 2009), p.3.

<sup>21</sup> Jess Sovern, “The jewel of their souls: preventing identity theft through loss allocation rules”, (2002–2003) 64 *University of Pittsburgh Law Review* 343, 380–381.

<sup>22</sup> Sovern, “The jewel of their souls: preventing identity theft through loss allocation rules”, (2002–2003) 64 *University of Pittsburgh Law Review* 343, 383.

<sup>23</sup> Risk neutrality refers to the attitude that one has to risk.

## Part two: a taxonomy of identity frauds in a conveyancing system

As noted in the section above, the ease in which fraud can be perpetrated in relation to land is staggering. They usually, but not always, occur in “the demimonde of low finance, of high interest [and] short term loans granted by demanding lenders to desperate borrowers”.<sup>24</sup> The first two cases discussed above illustrate the situation where the fraudulent person had a pre-existing relationship with the victim and where the fraudulent person colluded with a third party to impersonate the registered owner to perpetrate the fraud. In both *Grgic*<sup>25</sup> and *Ratcliffe*,<sup>26</sup> as was noted above, the fraud occurred because the impostor had in his/her possession the certificate of title and it was assumed that this then meant that the impostor was the registered proprietor of the land and had a right to deal with the land.<sup>27</sup> In both cases, if further identification had been required to be produced to substantiate the claim as to identity, the fraud may have been averted.<sup>28</sup>

These two cases also show that the relationship with the victim of the fraud was key to enabling the fraud. The relationship in both cases made it possible for the fraudulent person to obtain possession of the certificate of title and other documents necessary to perpetrate the fraud. In *Grgic* for example, the son was able to obtain the certificate of title because the father had agreed to support an earlier loan application that was made to the Commonwealth Bank of Australia. The father had accompanied the son and his wife to the bank, taking with him the certificate of title and other documents relating to the property. The certificate of title and other documents, including the form of mortgage executed by the father were left with the bank pending application of the loan. The loan was not approved and the son and his wife then went to bank to collect the certificate of title and the other documents that were left with the bank.<sup>29</sup>

Fraud can also occur without using a third party to impersonate the landowner. In *Young v Hoger*,<sup>30</sup> for example, the parents of the fraudulent person were joint tenants of the subject property.<sup>31</sup> Without the knowledge of the father, the daughter and the mother obtained a loan secured by a mortgage over the property, by forging the father’s signature on the memorandum of mortgage.<sup>32</sup> Default occurred and the daughter and the mother sought to refinance the loan; in doing so, the daughter forged the signatures of both her mother and father on the mortgage.<sup>33</sup> In both cases, the signatures on the mortgage were purportedly witnessed by a Justice of the Peace.<sup>34</sup> However that Justice of the Peace died before the trial, hence there was no evidence on the circumstances of the execution.<sup>35</sup> Similarly, in *Sansom v*

<sup>24</sup> *Hilton v Gray* (2008) Q. ConvR. 54-686 at [1].

<sup>25</sup> *Grgic* (1994) 33 N.S.W.L.R. 202.

<sup>26</sup> *Ratcliffe* (1969) 89 W.N. (Pt. 1) (NSW) 497.

<sup>27</sup> *Grgic* (1994) 33 N.S.W.L.R. 202 at 205–206, 223–224.

<sup>28</sup> For example in *Grgic* (1994) 33 N.S.W.L.R. 202 at 221, Powell J.A. noted that it may be possible to say that the bank officers “were less than meticulous in seeking to establish that the person who was introduced to them as Mr Grgic Snr was in truth the registered proprietor of the subject property”.

<sup>29</sup> *Grgic* (1994) 33 N.S.W.L.R. 202 at 204–205.

<sup>30</sup> *Young v Hoger* [2000] QSC 455 (Supreme Court of Queensland trial division); *Young v Hoger* [2001] Q.C.A. 453 (Supreme Court of Queensland Court of Appeal).

<sup>31</sup> *Young* [2000] QSC 455 at [8].

<sup>32</sup> *Young* [2000] QSC 455 at [13].

<sup>33</sup> *Young* [2000] QSC 455 at [21].

<sup>34</sup> *Young* [2000] QSC 455 at [13], [14] and [21].

<sup>35</sup> *Young* [2000] QSC 455 at [22].

*Westpac Banking Corp*,<sup>36</sup> a wife and her husband were the registered proprietors of certain properties, as well as joint holders of an overdraft account with Westpac Banking Corporation. The wife in *Sansom* had caused these properties to be mortgaged to the bank by forging the husband's signature on the mortgage instruments.<sup>37</sup>

In both cases, the pre-existing relationship<sup>38</sup> between the fraudulent person and the victim was a key factor in enabling the fraud. In these cases the fraudulent person is usually trusted and relied on by the victim of the fraud. In *Young* for example, the father relied upon and trusted his wife and daughter. The wife attended to all of the family dealings, the books of account, chequebooks, and all money matters.<sup>39</sup> Similarly in *Sansom*, the wife looked after the financial affairs; she controlled the chequebooks and did all the banking, signing most of the cheques drawn on their joint account.<sup>40</sup> This relationship of trust between victim and fraudulent person can enable the fraudulent person access to various documentation, such as the certificate of title, which can be used to aid in the perpetration of the fraud. It may also be said to encourage the lender to believe that the fraudulent person was acting or speaking on behalf of the victim so that all correspondence and relevant documentation, particularly the mortgage instrument, were given to the fraudulent person for the purposes of procuring execution. It is this ability to obtain the necessary documentation, particularly the mortgage instruments from the lender, which then gives the fraudulent person the opportunity to forge the victim's signature on the mortgage instrument. In *Sansom* for example, the wife had told the bank officer that her husband was ill with cancer and the bank officer had believed her and had given her mortgage documents to be signed by her husband. This gave her the opportunity to forge the husband's signature on the mortgage and return it to the bank.<sup>41</sup> It is no coincidence that the most common perpetrators of land title fraud in Australia are those who are known to the victim of the fraud, such as the victim's family members.<sup>42</sup>

In both cases, fraud may have been averted if the lender had attempted to contact the victim of the fraud. In *Young*, no contact was made with the victim, although the victim was a party to the transaction. All correspondence by the solicitor acting for the lender was addressed to the daughter and her mother, or just to the daughter.<sup>43</sup> More importantly, the mortgage instrument was given to the daughter and the mother for procuring execution. The solicitor did not have any dealings, direct or indirect, with the father; had he attempted to contact the father, he might have discovered that the father was being defrauded by his wife and daughter.<sup>44</sup> In *Sansom*, the bank did not get in contact with the husband before the mortgages

<sup>36</sup> *Westpac Banking Corp v Sansom* (1994) 6 B.P.R. 13,790; (1995) N.S.W. ConvR. 55-733; (New South Wales Supreme Court) BC9403430; *Sansom v Westpac Banking Corp* (1996) 7 B.P.R. 14,615; (1996) N.S.W. ConvR. 55-790; BC9600344 (appeal to the New South Wales Court of Appeal).

<sup>37</sup> *Sansom* (1996) 7 B.P.R. 14,615; (1996) N.S.W. ConvR. 55-790; BC9600344 at 7-8.

<sup>38</sup> In *Sansom*, it was the wife and in *Young*, the daughter in collusion with the mother.

<sup>39</sup> *Young* [2000] QSC 455 at [8].

<sup>40</sup> *Westpac Banking Corp* (1994) 6 B.P.R. 13,790; (1995) N.S.W. ConvR. 55-733; BC9403430 at 4-5.

<sup>41</sup> *Westpac Banking Corp* (1994) 6 B.P.R. 13,790; (1995) N.S.W. ConvR. 55-733; BC9403430 at 36.

<sup>42</sup> Low, "Opportunities for fraud in the proposed national electronic conveyancing system: fact or fiction?" (2006) 13(2) *Murdoch University Electronic Journal of Law* 225, 228.

<sup>43</sup> *Young* [2000] QSC 455 at [20].

<sup>44</sup> *Young* [2000] QSC 455 at [20] and [36].

were signed nor did the bank attempt to verify the truth as to the husband's illness.<sup>45</sup> Perhaps if the bank had contacted the husband to verify the mortgage transactions, the fraud might have been uncovered.

Both cases also highlight the situation where witnessing procedures were either disregarded, such as in *Sansom*, or circumvented, such as by forging the signature of the witness (which could be of a genuine or a fictitious person), thereby enabling the fraud. In *Sansom*, the witness (the bank officer) attested to the husband's signature on the mortgage instruments even though they were not signed in his/her presence.<sup>46</sup> Two recent fraud cases in Queensland show that the circumstances in which the fraud in *Young* and *Sansom* were perpetrated are not unique, and that they continue to feature in fraud cases occurring today. In *Hilton v Gray*<sup>47</sup> the fraudulent person was the stepdaughter. In that case, the lender believed he was lending money to Mr Gray (the victim of the fraud); with the monies to be forwarded to Mr Gray's step daughter (Mrs Lonergan).<sup>48</sup> In fact, Mrs Lonergan had forged Mr Gray's signature to the mortgage. Mr Gray knew nothing of the loan.<sup>49</sup> When the lender's solicitors began to suspect fraud, they checked the witnessing of the documents and contacted the Justice of the Peace who had purportedly witnessed Mr Gray's signature.<sup>50</sup> At trial, the Justice of the Peace confirmed that she did not witness signatures unless some form of photo identification was provided.<sup>51</sup> Douglas J. opined that perhaps Mrs Lonergan may have used a third party to impersonate her step father and provided the impostor with identification documents in her step father's name to assist her in the fraud.<sup>52</sup> Mrs Lonergan also forged the signature of a fictitious person to the independent solicitor's advice when a second advance increasing the principal sum was sought, so that it appeared that a solicitor by the name of "Jacinta Rose" had signed the independent solicitor's advice. No solicitor of that name was admitted to practice in Queensland. Had the lender's solicitors checked the name, they might have discovered the fraud.<sup>53</sup> In *Royalene Pty Ltd v Registrar of Titles*,<sup>54</sup> the fraudulent person was the victim's son-in-law, who had forged both the victim's signature on the mortgage as well as the signature of the witness to the mortgagor's signature.<sup>55</sup> The son-in-law had contacted a mortgage broker and informed the mortgage broker that he was the husband of the victim of the fraud, that he wanted to obtain a loan and that there was an unencumbered property in his wife's name that could be used as security.<sup>56</sup> The son-in-law was also able to fax a number of documents to the mortgage broker, including a copy of the victim's driver's licence and a rates notice of the property.<sup>57</sup> The lender's solicitors sent the mortgage and other documents to the mortgage broker who then forwarded the documents via

<sup>45</sup> *Westpac Banking Corp* (1994) 6 B.P.R. 13,790; (1995) N.S.W. ConvR. 55-733; BC9403430 at 36.

<sup>46</sup> *Westpac Banking Corp* (1994) 6 B.P.R. 13,790; (1995) N.S.W. ConvR. 55-733; BC9403430 at 36 and 39.

<sup>47</sup> *Hilton* (2008) Q. ConvR. 54-686.

<sup>48</sup> *Hilton* (2008) Q. ConvR. 54-686 at [1].

<sup>49</sup> *Hilton* (2008) Q. ConvR. 54-686 at [1].

<sup>50</sup> *Hilton* (2008) Q. ConvR. 54-686 at [14] and [15].

<sup>51</sup> *Hilton* (2008) Q. ConvR. 54-686 at [15].

<sup>52</sup> *Hilton* (2008) Q. ConvR. 54-686 at [15].

<sup>53</sup> *Hilton* (2008) Q. ConvR. 54-686 at [13].

<sup>54</sup> *Royalene v Registrar of Titles* [2008] Q. ConvR. 54-689.

<sup>55</sup> *Royalene* [2008] Q. ConvR. 54-689 at [2].

<sup>56</sup> *Royalene* [2008] Q. ConvR. 54-689 at [10].

<sup>57</sup> *Royalene* [2008] Q. ConvR. 54-689 at [12].

email to the fraudulent person.<sup>58</sup> This then enabled the fraudulent person to forge the signatures on the mortgage documents. No certified copy of the driver's licence was provided with the executed documents.<sup>59</sup> Daubney J. found that had the mortgage broker or the solicitor been more vigilant in obtaining a certified copy of the driver's licence, the fraud may not been uncovered.<sup>60</sup>

The cases thus far highlight frauds perpetrated by those who have a pre-existing relationship with the fraud victim. However, as observed in the previous section, fraud can also be perpetrated by those without a pre-existing relationship with the victim of the fraud. For example, in 2003, it was reported that illegal finance brokers were manufacturing false identities to enable customers to obtain bank loans. These brokers created new identities using fake drivers' licences, council rates notices, medicare cards, employers' references, credit cards and bank statements.<sup>61</sup> In 2007, Land and Property Information (LPI) New South Wales uncovered a mortgage fraud scheme involving counterfeit certificates of title. Nine counterfeit certificates of title were discovered by LPI.<sup>62</sup> According to LPI, the counterfeit Certificates of Title used in the fraud scheme are produced by superimposing details from title searches of genuine titles on forged certificates in the format used prior to the introduction of certificates with enhanced security features in January 2004. The counterfeits were of reasonably high quality and were used in conjunction with forged identity documents as a means of proving ownership.<sup>63</sup> Then in 2009, LPI uncovered a mortgage fraud scheme operating in Victoria affecting land in NSW, again using counterfeit titles. Two counterfeit certificates were identified by LPI affecting the same property.<sup>64</sup> False identity documents were also used to perpetrate fraud in New Zealand in 2005, when false passports, bank statements and tax certificates were used by the fraudulent person to convince three lawyers to arrange mortgages over homes that the fraudulent person did not own.<sup>65</sup> These frauds, the manner they are perpetrated and the factors enabling them are captured in the table below.<sup>66</sup>

<sup>58</sup> *Royalene* [2008] Q. ConvR. 54-689 at [46].

<sup>59</sup> *Royalene* [2008] Q. ConvR. 54-689 at [46].

<sup>60</sup> *Royalene* [2008] Q. ConvR. 54-689 at [48].

<sup>61</sup> Kara Lawrence, "Forging a New 'Industry' of Fraudulent Bank Loans", *The Daily Telegraph*, February 24, 2003.

<sup>62</sup> *Land and Property Information NSW, Mortgage Frauds Involving Counterfeit Certificates of Title* (2007) [http://rgdirections.lands.nsw.gov.au/\\_data/assets/pdf\\_file/0016/48103/2007-01\\_Mortgage\\_frauds\\_involving\\_counterfeit\\_Certificates\\_of\\_Title.pdf](http://rgdirections.lands.nsw.gov.au/_data/assets/pdf_file/0016/48103/2007-01_Mortgage_frauds_involving_counterfeit_Certificates_of_Title.pdf) at April 6, 2010 [Accessed July 6, 2011].

<sup>63</sup> *Land and Property Information NSW, Mortgage Frauds Involving Counterfeit Certificates of Title* (2007) [http://rgdirections.lands.nsw.gov.au/\\_data/assets/pdf\\_file/0016/48103/2007-01\\_Mortgage\\_frauds\\_involving\\_counterfeit\\_Certificates\\_of\\_Title.pdf](http://rgdirections.lands.nsw.gov.au/_data/assets/pdf_file/0016/48103/2007-01_Mortgage_frauds_involving_counterfeit_Certificates_of_Title.pdf) at April 6, 2010 [Accessed July 6, 2011].

<sup>64</sup> *Land and Property Information NSW, Mortgage Frauds Involving Counterfeit Certificates of Title* (2009) [http://rgdirections.lands.nsw.gov.au/\\_data/assets/pdf\\_file/0009/93294/2009-01\\_Mortgage\\_frauds\\_involving\\_counterfeit\\_Certificate\\_of\\_Title.pdf](http://rgdirections.lands.nsw.gov.au/_data/assets/pdf_file/0009/93294/2009-01_Mortgage_frauds_involving_counterfeit_Certificate_of_Title.pdf) at April 6, 2010 [Accessed July 6, 2011].

<sup>65</sup> See Catriona MacLennan, "Warning about conveyancing fraud using false passports" (2005) (39) *Auckland District Law Society Law News* 1 and Anne Gibson, "Department Protects Homes From More Fraud" *New Zealand Herald* (Auckland), 2006.

<sup>66</sup> This table was adapted from the table in Low, "Opportunities for fraud in the proposed national electronic conveyancing system: fact or fiction?" (2006) 13(2) *Murdoch University Electronic Journal of Law* 225.



Category	Mode of perpetration	Relationship with victim	Factors facilitating fraud
<i>Grגיע</i> type fraud cases	<ul style="list-style-type: none"> <li>• Fraudulent person, with or without the aid of a third party, claiming that he/she has a right to deal with the land by producing the appropriate identity documents.</li> <li>• The identity documents may be genuine or falsified.</li> </ul>	There is a pre-existing relationship.	<ul style="list-style-type: none"> <li>• Fraudulent person's relationship with the victim provides the fraudulent person with access to the victim's identity documents.</li> <li>• Lack of vigilance by the lender in verifying identity.</li> </ul>
<i>Young</i> type fraud cases	<ul style="list-style-type: none"> <li>• Land title instrument given to the fraudulent person to procure execution by the victim of the fraud.</li> <li>• Fraudulent person forges the victim's signature on the land title instrument.</li> <li>• Witnessing requirements are circumvented, either by: <ul style="list-style-type: none"> <li>— forging the signature of the witness. This can be of a real person or a fictitious person; or</li> <li>— persuading the witness to attest to the signature even though it was not signed in the presence of the witness.</li> </ul> </li> </ul>	There is a pre-existing relationship.	<ul style="list-style-type: none"> <li>• Relationship between victim and fraudulent person—fraudulent person is trusted by the victim which provides the fraudulent person with easy access to the paper certificate of title and various other documents.</li> <li>• Lack of vigilance by the lender, for example: <ul style="list-style-type: none"> <li>— all correspondences addressed to the fraudulent person as the fraudulent person is usually seen as speaking for or on behalf of the victim;</li> <li>— land title instrument provided to the fraudulent party to procure execution from the victim;</li> <li>— the victim is not contacted or dealt with even though the victim is a party to the transaction (e.g. <i>Young</i>);</li> </ul> </li> <li>• The witness to the signature(s) on the instrument attests to the signature(s) even though the signature was not signed in front of the witness (e.g. <i>Sansom</i>).</li> </ul>

Category	Mode of perpetration	Relationship with victim	Factors facilitating fraud
<i>Grgic</i> type fraud cases	<ul style="list-style-type: none"><li>• Fraudulent person, with or without the aid of a third party, claiming that he/she has a right to deal with the land by producing the appropriate identity documents.</li><li>• The identity documents may be genuine or falsified.</li></ul>	There is a pre-existing relationship.	<ul style="list-style-type: none"><li>• Fraudulent person's relationship with the victim provides the fraudulent person with access to the victim's identity documents.</li><li>• Lack of vigilance by the lender in verifying identity.</li></ul>
LPI type fraud cases	<ul style="list-style-type: none"><li>• Fraudulent person, with or without the aid of a third party, claiming that he/she has a right to deal with the land by producing the appropriate identity documents.</li><li>• The identity documents may be genuine or falsified.</li></ul>	No pre-existing relationship.	<ul style="list-style-type: none"><li>• Ability to falsify identity documents or to obtain genuine identity documents.</li><li>• Lack of vigilance by the lender in verifying identity.</li><li>• Lack of vigilance by the entity responsible for issuing identity documents in incorrectly issuing the identity documents (such as the NSW Land Titles Office issuing certificates of title in <i>Challenger's</i> case).</li></ul>

How will these frauds translate to an electronic environment, such as the National Electronic Conveyancing System (NECS), where users of the system log in to the system, prepare land title documents online, which are then digitally signed and electronically lodged for registration? It has been found that all the paper-based frauds described here can continue to occur in an electronic environment.<sup>67</sup> Using a conveyance under NECS as a case study,<sup>68</sup> the facts in *Young, Sansom* and *Grgic*,

<sup>67</sup> See Low, “The use of technology to automate the registration process within the Torrens System and its impact on fraud: an analysis”, unpublished PhD thesis, Queensland University of Technology, 2008, 86–90; Low, “Opportunities for fraud in the proposed national electronic conveyancing system: fact or fiction?” (2006) 13(2) *Murdoch University Electronic Journal of Law* 225; Rouhshi Low, “From paper to electronic: exploring the fraud risks stemming from the use of technology to automate the Australian torrens system” (2009) 21(2) *Bond Law Review* 107.

<sup>68</sup> An overview of property conveyancing and how it will operate under the National Electronic Conveyancing System can be found in Clatyon Utz, “NECS Legal Framework Development Volume 2”, May 27, 2009, updated February 15, 2010, [4.1]. For present purposes, it is relevant to note that a legal practitioner or financial institution would be a subscriber to the system, within these organisations there would be designated users and certifiers—certifiers having the authority to sign transactions digitally. A client purchasing land would go to a solicitor and the solicitor (subscriber) would then verify that person's identity. The subscriber will need to keep records that the identity checks have been done and performed. Once the normal title and associated checks have been done, the instruments will be prepared by the NECS for certification. The certifier will then review the instruments and use their private key to sign the documents. The NECS will verify that the certifier does in fact have the accreditation to sign. For more on these roles, see National Electronic Conveyancing Office, *NECS Draft Operations Description V6*, 2007 [4.3].

may be used hypothetically as an illustration (though if these facts are transposed to an English context, the power of rectification available via the Land Registration Act 2002 Sch.4 para.2(1) may lead to a different result)<sup>69</sup>:

- The daughter in *Young* could perpetrate fraud if the mortgagee's solicitor, who is a NECS Subscriber, provides her with the authorisation form<sup>70</sup> to procure execution on behalf of the father and mother. The daughter then forges her father's signature on the authorisation form, as well as the signature of the witness, so that it appears that the father's signature has been properly witnessed. The form is brought back to the solicitor, who acts upon the form as the authorised user and proceeds with the transaction.
- The wife in *Sansom* approaches a bank, who is a NECS Subscriber, stating that she wishes to mortgage the property owned by her and her husband. The bank officer prepares an authorisation form. The wife then tells the bank officer that her husband is too ill with cancer to attend at the bank, requesting that she be allowed to take the form back to procure execution from him. The bank officer allows her to do this. She forges the husband's signature on the authorisation form and it is witnessed by the bank officer, even though it was not signed in his or her presence. The authorisation form is then acted on—the property is mortgaged with the proceeds going to the wife.
- The son in *Grgic* finds a person willing to impersonate his father. The son has in his possession a rates notice of the property in question. If certificates of title are used in the NECS,<sup>71</sup> the son could obtain the paper certificate of title. The son and the impostor visit a bank, who is a NECS Subscriber. The son introduces the impostor to the bank officer as his father and produces the rates notice and certificate of title. The bank officer prepares an authorisation form, which is signed by the impostor. The property is mortgaged and the monies advanced to the son.

In addition, an automated system, such as the NECS, may even provide different opportunities for fraudulent conduct.<sup>72</sup> For example, a certifier employed by a subscriber of the NECS could be careless in the way he/she stores his/her private

<sup>69</sup> Relevant English authorities to consider include *Argyle Building Society v Hammond* (1985) 49 P. & C.R. 148; (1984) 81 L.S.G. 3425 CA (Civ Div); *Barclays Bank Plc v Guy* [2008] EWCA Civ 452; [2008] 2 E.G.L.R. 74 (this case is presently under appeal).

<sup>70</sup> The authorisation form is the document used in NECS by the Subscriber to obtain authorisation from the client so that the Subscriber can represent the client in a transaction, digitally sign registry instruments and electronically lodge the instruments on behalf of the client: National Electronic Conveyancing Office, *NECS Draft Operations Description V6*, 2007, [9.2.3.3].

<sup>71</sup> At the time of writing, the question of whether certificates of title will be used in the NECS is still the subject of national uniform consultations: National Electronic Conveyancing Office, *NECS Draft Operations Description V6*, 2007, [9.2.6.15].

<sup>72</sup> For more on this see Low, "The use of technology to automate the registration process within the Torrens System and its impact on fraud: an analysis", unpublished PhD thesis, Queensland University of Technology, 2008, 86–90; Low, "Opportunities for fraud in the proposed national electronic conveyancing system: fact or fiction?" (2006) 13(2) *Murdoch University Electronic Journal of Law* 225 and Rouhshi Low and Ernest Foo, "The susceptibility of digital signatures to fraud in the national electronic conveyancing system: an analysis" (2009) 17 *Australian Property Law Journal* 303.

key which is used to digitally sign land title instruments.<sup>73</sup> The certifier may store the private key in a USB device but leave the USB device at work on the office desk. The certifier may have written down both the user-id and password required to log in to NECS.<sup>74</sup> Another employee of the subscriber could then use the certifier's user-id and password and private key to access NECS and perpetrate fraud. Alternatively, a fraudulent person could apply to be registered<sup>75</sup> with the NECS as a subscriber and certifier of the NECS. For example, the fraudulent person could compile a set of identity documents that identify him/her as a legal practitioner, apply to a Gatekeeper Certification Authority/Registration Authority (CA/RA) for a digital signature certificate<sup>76</sup> and lodge an application to be listed as a subscriber and certifier.<sup>77</sup> If successful, the fraudulent person would be listed on NECS as a subscriber and certifier, will be given a user-id and password to access NECS and will also have a digital signature certificate to sign instruments. The fraudulent person could then access NECS and perpetrate fraud.<sup>78</sup>

<sup>73</sup> For more about the use of digital signature certificates in the NECS, see: NECS National Electronic Conveyancing Office, *NECS Draft Operations Description V6*, 2007, [9.3.3], National Electronic Conveyancing Office, *Risk Analysis of DSC Types for Authorised Officers and Certifiers*, 2008; Clayton Utz, *NECS Legal Framework Development*, Final Report Vol.1, 2010, [17] and Low and Foo, "The susceptibility of digital signatures to fraud in the national electronic conveyancing system: an analysis" (2009) 17 *Australian Property Law Journal* 303.

<sup>74</sup> To access the NECS, a user-id and password is required to log-in to the NECS: see National Electronic Conveyancing Office, *NECS Draft Operations Description V6*, 2007, [9.2.4]. The case that occurred at the Fairfax County Public School in Falls Church, Virginia show how easy it is for someone to make use of a password that has been written down to access a system. In that case, a nine-year-old student at the school had taken a teacher's password from a desk and used it to access the school's system to change enrolment lists and other teachers' passwords: Robert McMillan, "Nine-year-old steals password to school system" <http://news.techworld.com/security/3220809/nine-year-old-steals-password-to-school-system/?olo=rss> at June 17, 2010 [Accessed July 6, 2011].

<sup>75</sup> To be able to use NECS, industry participants must first become registered with the NECS as a user. This can be done in one of two ways: (1) apply to the NECS to be registered as a Subscriber and User; or (2) have an existing Subscriber sponsor the application to be a User supervised by that Subscriber: NECS National Electronic Conveyancing Office, *NECS Draft Operations Description V6*, 2007, [7.3].

<sup>76</sup> The NECS application process requires the applicant to obtain an approved type of digital signature certificate to sign the application: National Electronic Conveyancing Office, *NECS Draft Operations Description V6*, 2007, [7.3], Clayton Utz, *NECS Legal Framework Development*, Final Report Vol.1, 2010, Attachment 3, [1]. The term Registration Authority (RA) refers to the entity responsible for verifying the identity of applicants and the term Certification Authority refers to the entity responsible for issuing digital signature certificates to those applicants whose identity has been verified. Gatekeeper is a Federal Government initiative to increase confidence in the online economy providing a Government endorsed online trust framework using public key technology: see Verisign, "Gatekeeper Digital Certificates overview", <http://www.verisign.com.au/gatekeeper/overview.shtml> at April 16, 2010 [Accessed July 6, 2011]; Verisign, "Gatekeeper Services Whitepaper" (2003) <http://www.verisign.com.au/gatekeeper/gatekeeper.pdf> at October 8, 2010 and Low and Foo, "The susceptibility of digital signatures to fraud in the national electronic conveyancing system: an analysis" (2009) 17 *Australian Property Law Journal* 303. Given that users of the Victorian EC System obtain the required Gatekeeper Australian Business Number-Digital Signature Certificate (ABN-DSC) from Verisign, it is likely that Verisign, which is Gatekeeper accredited, will also be used by NECS: Verisign, "Verisign gatekeeper: electronic conveyancing" <http://www.verisign.com.au/gatekeeper/ec/index.html> at October 8, 2010 [Accessed July 6, 2011].

<sup>77</sup> See National Electronic Conveyancing Office, *NECS Draft Operations Description V6*, 2007, [9.1.2.1]: a sole practitioner can be listed as a Subscriber and Certifier.

<sup>78</sup> For more on this see Low and Foo, "The susceptibility of digital signatures to fraud in the national electronic conveyancing system: an analysis" (2009) 17 *Australian Property Law Journal* 303 and National Electronic Conveyancing Office, *Risk Analysis of DSC Types for Authorised Officers and Certifiers*, 2008. A recent example occurred in New Zealand where a lawyer had, when acting for clients in the sale of their farm through the Landonline system, withdrawn a caveat placed over the farm by third parties. The lawyer had no authority to act for the third parties, did not have their consent to withdraw the caveat and did not hold a Landonline Authority and Instruction from the third parties authorising him to withdraw the caveat. The New Zealand Standards Committee commented that "unauthorised actions of this kind imperil the e-dealing system". The Committee said that certified practitioners have a responsibility "to ensure that all relevant matters are in order before instruments are submitted and the Land Register altered" and that this responsibility is "fundamental to the integrity of the system". In that case, the lawyer was censured and required to pay AU \$1,300 by way of penalty, plus AU \$12,000 in respect of the costs of the inquiry: New Zealand Law Society, "Lawyers Complaints Service Decisions—Bringing the profession into disrepute: withdrawal of caveat placed by third parties" [http://www.lawsociety.org.nz/home/for\\_the\\_public/lawyers\\_standards\\_committee\\_decisions](http://www.lawsociety.org.nz/home/for_the_public/lawyers_standards_committee_decisions) at October 8, 2010 [Accessed July 6, 2011]. This case confirms the concern voiced by Rod

The point is that in the paper system, it is the registered proprietor of the property in question who is the target of the fraud and its victim because in the paper system, it is this person who must execute the appropriate land title instruments. So they are targeted for fraud purposes, such as by forging the person's signature on the land title instrument or impersonating the person—the *Young, Grgic* type fraud cases or preparing a set of false identity documents, including false certificates of title to assume ownership (the LPI type fraud cases).

However, if an automated system, such as NECS, alters this process by allowing only an authorised user of the system to prepare land title instruments and to sign them on behalf of clients, then these authorised users may be targeted instead, raising a new opportunity for perpetrating fraud. In these frauds, there may be no connection between the fraudulent person and the registered proprietor of the land—the fraud is perpetrated because the fraudulent person has or is able to gain access and has the ability to sign instruments digitally or is able to acquire this ability. It is not the relationship between the victim and the fraudulent person that is the facilitative factor in the fraud, this type of fraud simply depends on whether or not the fraudulent person is able to obtain access, digitally sign the instruments and lodge for registration.<sup>79</sup>

The various frauds that can potentially be perpetrated in an electronic environment are represented in the table below.<sup>80</sup> This is then followed by consideration of the current steps taken to prevent identity fraud in land transactions.

Category	Mode of perpetration	Relationship with victim	Factors facilitating fraud
<i>Grgic</i> type fraud cases	<ul style="list-style-type: none"> <li>Fraudulent person, with or without the aid of a third party, claiming that he/she has a right to deal with the land by producing the appropriate identity documents.</li> <li>The identity documents may be genuine or falsified.</li> </ul>	There is a pre-existing relationship.	<ul style="list-style-type: none"> <li>Fraudulent person's relationship with the victim provides the fraudulent person with access to the victim's identity documents.</li> <li>Lack of vigilance by the Subscriber acting for the lender in verifying identity.</li> </ul>
<i>Young</i> type fraud cases	<ul style="list-style-type: none"> <li>Authorisation form given to the fraudulent person to procure execution by the victim of the fraud.</li> <li>Fraudulent person forges the victim's signature on the authorisation form.</li> </ul>	There is a pre-existing relationship.	<ul style="list-style-type: none"> <li>Relationship between victim and fraudulent person—fraudulent person is trusted by the victim which provides the fraudulent person with easy access to various documents such as rates notice.</li> </ul>

Thomas regarding the New Zealand Landonline system of its potential for abuse by solicitors entrusted with its use: Rod Thomas, "Fraud, Risk and the Automated Register" in David Grinlinton (ed.), *Torrens in the Twenty-first Century* (Wellington: LexisNexis, 2003), p.349.

<sup>79</sup> Low, "The use of technology to automate the registration process within the Torrens System and its impact on fraud: an analysis", unpublished PhD thesis, Queensland University of Technology, 2008, 86–90, [6.5].

<sup>80</sup> This table was adapted from the table in Low, "Opportunities for fraud in the proposed national electronic conveyancing system: fact or fiction?" (2006) 13(2) *Murdoch University Electronic Journal of Law* 225.

Category	Mode of perpetration	Relationship with victim	Factors facilitating fraud
	<ul style="list-style-type: none"><li>• Witnessing requirements are circumvented, either by:<ul style="list-style-type: none"><li>— forging the signature of the witness. This can be of a real person or a fictitious person; or</li><li>— persuading the witness to attest to the signature even though it was not signed in the presence of the witness.</li></ul></li></ul>		<ul style="list-style-type: none"><li>• Lack of vigilance by the lender, for example:<ul style="list-style-type: none"><li>— all correspondences addressed to the fraudulent person as the fraudulent person is usually seen as speaking for or on behalf of the victim;</li><li>— authorisation form provided to the fraudulent party to procure execution from the victim;</li><li>— the victim is not contacted or dealt with even though the victim is a party to the transaction (e.g. <i>Young</i>);</li></ul></li><li>• The witness to the signature(s) on the authorisation attests to the signature(s) even though the signature was not signed in front of the witness (e.g. <i>Sansom</i>).</li></ul>
<i>Gr g i c</i> <i>t y p e</i> <i>f r a u d</i> <i>c a s e s</i>	<ul style="list-style-type: none"><li>• Fraudulent person, with or without the aid of a third party, claiming that he/she has a right to deal with the land by producing the appropriate identity documents.</li><li>• The identity documents may be genuine or falsified.</li></ul>	There is a pre-existing relationship.	<ul style="list-style-type: none"><li>• Fraudulent person's relationship with the victim provides the fraudulent person with access to the victim's identity documents.</li><li>• Lack of vigilance by the lender in verifying identity.</li></ul>
LPI type fraud cases	<ul style="list-style-type: none"><li>• Fraudulent person, with or without the aid of a third party, claiming that he/she has a right to deal with the land by producing the appropriate identity documents.</li><li>• The identity documents may be genuine or falsified.</li></ul>	No pre-existing relationship	<ul style="list-style-type: none"><li>• Ability to falsify identity documents or to obtain genuine identity documents.</li><li>• Lack of vigilance by the Subscriber in verifying identity.</li><li>• Lack of vigilance by the entity responsible for issuing identity documents in incorrectly issuing the identity documents (such as the NSW Land Titles</li></ul>

Catego- ry	Mode of perpetration	Relationship with victim	Factors facilitating fraud
			Office issuing certificates of title in <i>Challenger's</i> case).
New category of fraud	Unauthorised use of an existing Certifier's user-id/password and digital signature certificate to access NECS and perpetrate fraud.	Relationship with victim not relevant to the fraud	<ul style="list-style-type: none"> <li>• Certifier was careless in storing login and password details and careless in storing the private key for digital signing.</li> </ul>
New category of fraud	Falsely registering with NECS as a Subscriber and Certifier.	Relationship with victim not relevant to the fraud	<ul style="list-style-type: none"> <li>• Ability to falsify identity documents or to obtain genuine identity documents.</li> <li>• Gatekeeper CA/RA careless in verifying identity.</li> </ul>

### Part three: assessment of the risk and legislative and regulatory responses

As noted in the request for tender for the client identification protocols of the national electronic conveyancing system:

"Acceptance of [the] new arrangements by industry participants generally and by key industry and government stakeholders in particular is dependent on their confidence that all significant risks are known, have been fairly allocated and will be effectively managed ... It is critical to the operation of the [land registration] system in each jurisdiction that there is a fair allocation of residual risk to the assurance funds."<sup>81</sup>

Indeed, and with a recognition that whilst any one individual being subject to identity fraud and losing their property is of low probability, there is conversely no doubt that some people will lose their property because of identity fraud. The risk to the individual, small; the risk to the system, certain. The goal of any risk minimisation and allocation of loss strategy must therefore be to highlight who is the most appropriate individual(s) to apportion loss to, and what practical risk reduction strategies can be put in place. Indeed Clayton Utz suggest that the more rigorous responsibilities imposed under an electronic conveyancing system<sup>82</sup> will involve a threat that a participant may fail to meet those more onerous burdens, the "overall effect ... should be a net reduction in conveyancing risk and a safer and more robust conveyancing system".<sup>83</sup> Connected to the thesis of this article is a requirement that certifier or the subscriber under the national electronic

<sup>81</sup> *NECS Request for Tender, CIV Standard and Application Procedures Development for NECS*, January 22, 2010, [2.10].

<sup>82</sup> See generally Celia Hammond, "The abolition of the duplicate certificate of title and its potential effect on fraudulent claims over Torrens land" (2000) 8 *Australian Property Law Journal* 115 for a discussion of the potential for fraud to arise in an electronic environment. See also Low, "The use of technology to automate the registration process within the Torrens System and its impact on fraud: an analysis", unpublished PhD thesis, Queensland University of Technology, 2008, 86–90.

<sup>83</sup> Clayton Utz, "Risk assessment of the National Electronic Conveyancing System", Final Report to the National Steering Committee, February 9, 2007, [1.12]

conveyancing protocols undertake and maintain adequate records of client identification with this mandated by land registry offices. The goals of this obvious<sup>84</sup>:

- Ensuring that the public has confidence with the system;
- maintenance of the integrity of the land registration system;
- achieve highest practical and functional accuracy within the Register;
- ensure that the electronic system is efficient, viable, attractive and cost effective when compare with paper processes; and
- be cost neutral in terms of the potential liability upon the assurance funds.

The importance of meeting the previously mentioned goals is obvious from a policy perspective. However there is a far more basal reason for why subscribers to the system would seek to mandate a high standard. This arises from the operation and implementation of the Federal Government's responsibilities under various international law instruments including the United Nations Convention against Corruption 2003, the United Nations Convention against Transnational Organised Crime 2000 and the International Convention for the Suppression of the Financing of Terrorism 1999, with these soft-law instruments leading to the enactment of the Anti-Money Laundering and Counter Terrorism Act 2006. Before considering these Federal initiatives which understandably have a focus and reach far beyond conveyancing, it is necessary to consider the specific measures to address identity fraud within the land registration systems in Australia and describe how two jurisdictions, New South Wales and Queensland, have sought to respond to these concerns.

### *New South Wales legislation*

Section 56C of the Real Property and Conveyancing Legislation Amendment Act 2009 provides that the mortgagee must take reasonable steps to ensure that the person who executed the mortgage, or on whose behalf it has been executed as mortgagor, is indeed the same person as the registered proprietor of the land. Subsection 2 indicates that these requirements will be met if the mortgagee has taken the steps as prescribed in the regulations. A failure to do this provides a reason by which the Registrar-General may cancel a recording in respect of a mortgage (s.56(6)). In the absence of promulgated regulations at the time of writing, we see in late 2009, a consultation paper was released by the Land and Property Management Authority of New South Wales<sup>85</sup> seeking discussion on the level of identity verification that should be imposed on mortgagees. The concluded view of this paper was that the verification regime should contain the following elements:

- a face to face interview with the mortgagor(s);
- document based verification rather than verification by electronic data;

<sup>84</sup> See also, National Electronic Conveyancing Office, Memo to National Project Team, December 23, 2008, "Standard for Client Identity Verification", 2.

<sup>85</sup> Land and Property Management Authority NSW, *Consultation Paper Confirmation of Identity—Sections 56C and 117 of the Real Property Act 1900*, December 21, 2009.



- a minimum of two and preferably three identification documents (one of which should contain a photograph)<sup>86</sup>; and
- original documents must be sighted, rather than certified copies.<sup>87</sup>

### *Queensland legislation*

This legislation has a like objective to that of New South Wales—impose greater obligations on the mortgagees. Section 11A of the Land Title Act 1994 is in similar terms to its southern neighbour with the reference in s.3 to compliance with the manual of land title practice.<sup>88</sup> A point of difference between the jurisdictions is that rather than provide a discretion to the Registrar-General to cancel the mortgage, this legislation expressly provides that a failure to undertake the verification steps will see a mortgagee unable to rely on indefeasibility (s.185(1A)).

### *Anti-Money Laundering and Counter Terrorism Act 2006*

Under s.35 of this legislation a reporting entity must carry out and verify the identity of those with whom it deals. A reporting entity is one that carries out designated services, with this latter phrase (s.6) including the making of a loan where that loan is made in the course of carrying on a loans business. In short, the financial institutions associated with the housing and commercial mortgage market in Australia would undoubtedly come within the province of this legislation. Relevant for instant purposes is that the legislation prescriptively mandates certain requirements vis-à-vis client identification. The Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No.1) then puts the flesh to the skeleton outlined in the establishing legislation. Part 4.2 of the Rules provides that a reporting entity must collect at a minimum, the following information in respect of an individual:

- the customer's full name;
- the customer's date of birth; and
- the customer's residential address.

This information must then be verified either by:

- reliable and independent documentation;
- reliable and independent electronic data; or
- a combination of reliable and independent documentation and electronic data.

<sup>86</sup> Satisfactory documents to meet the requirements of the photographic ID are stated to be and Australian passport (current or expired in last two years); an Australian driver's licence; a NSW photo card or an overseas passport. Land and Property Management Authority NSW, *Consultation Paper Confirmation of Identity—Sections 56C and 117 of the Real Property Act 1900*, December 21, 2009, 3.

<sup>87</sup> Land and Property Management Authority NSW, *Consultation Paper Confirmation of Identity—Sections 56C and 117 of the Real Property Act 1900*, December 21, 2009, 4.

<sup>88</sup> At the moment this refers to the Commonwealth Financial Transactions Reports Regulations 1990. This subordinate legislation refers to the 100 point identity check whereby certain documents must be produced before, for example, a bank account can be opened. Documents are given a different value (e.g. a photographic driver's licence is worth 40 points, a land record 35 points and a public utility bill 25 points).

Paragraph 4.2.8 also requires the reporting entity to establish risk-based systems and controls for the reporting to know whether any additional information should be sought to enable the recording entity to know their customer.

It is the view of the authors that the safe-harbour as established by this legislation is inadequate in the context of land transactions and the application of indefeasibility to the title of the non-fraudulent owner. The objects of the anti-money laundering legislation are very much different from the more mundane focus of land transactions. As noted, the Federal Government introduced this legislation to meet its international obligations with a focus on combating the pernicious activities as outlined in the legislation's title. Further, this legislation allows the reporting entity to establish its own level of risk for each transaction and to embed the level of verification dependant on the perception of risk attached to that transaction. As can be seen from the examples highlighted above, the contemporary capacity to produce documents that can easily pass the standards required for client identification mandate a higher onus. Similarly, it is considered that the options of New South Wales and Queensland, whilst superior to the vacuum that exists in other states still falls far short of what is required.

### *The Australian Government's gold standard*

The view of the authors is that the recommended level of identity verification for land transactions should be that of the Australian Government's gold standard on client identification.<sup>89</sup> This view is supported by the land registrars.<sup>90</sup> Principle 2 of this standard states:

"The Gold Standard should be applied in circumstances where the consequences flowing from registering a false identity are high and a high level of confidence in establishing a person's identity is required. It should be used when issuing key POI (Proof of Identity) credentials or for national security checking purposes."<sup>91</sup>

Adopting these principles sees three levels of evidence required:

- evidence of commencement of identity in Australia (such as a birth certificate);
- evidence of a person's identity in the community—that is the verification of a person's social footprint (e.g. local government rates information); and
- a linkage between the claimed identity and the applicant. Most commonly this would require photographic or biometric evidence.

This evidence would then need to be verified by face-to-face interview and for future reference, bind the applicant through additional photographic evidence or biometric evidence of the applicant. The recommendation of us is that this standard should be the safe-harbour for Subscribers to the National Electronic Conveyancing

<sup>89</sup> See Commonwealth Government, *Report to the Council of Australian Governments on the elements of the National Identity Security Strategy*, April 2007.

<sup>90</sup> National Electronic Conveyancing Office, Memo to National Project Team, December 23, 2008, "Standard for Client Identity Verification", 3.

<sup>91</sup> Commonwealth Government, *Report to the Council of Australian Governments on the elements of the National Identity Security Strategy*, April 2007, 4–5.

System, with additional obligations imposed on Subscribers to the NECS where there is a reason to believe that the person is not whom they appear to be. This gold standard must be adopted and utilised in Australia—not only because it is consistent with the policy behind certainty of title in a land registration system, and with most fraudulent transactions involving mortgagors acting as imposters, the extra costs associated with verifying identity will be merely the burden of gaining the benefits of immediate indefeasibility.

#### **Part four: What the adoption of this Gold Standard should mean for the future in reducing risk and allocating loss in land transactions**

To date the prevailing argument from Parts one and two is that the mortgagee should primarily bear the risks associated with identity fraud. We then suggested that in meeting that obligation the Federal Governments Gold Standard on identity verification should be adopted. It is the view of the authors that, for the reasons listed in above, the mortgagee in the NECS should continue to bear the responsibility for the paper type identity frauds identified in Part two that can continue to occur in the NECS; that is:

- *Young* type frauds;
- *Grgic* type frauds; and
- LPI type frauds.

These frauds occur at the point where the fraudulent person approaches the mortgagee for a loan. As can be seen from the discussion in Part two, in these frauds, whether they occur in the paper system or in NECS, the registered proprietor is the victim of the fraud and it is the registered proprietor's identity that is used to perpetrate fraud. Whilst the registered proprietor may, in some cases, bear some responsibility for facilitating identity fraud, the entity best able to prevent fraud in these cases, as can be seen from the discussion above, is the mortgagee, by verifying identity. The mortgagee is therefore the most appropriate entity for assuming the responsibility of verifying identity in these types of fraud and in both Queensland and New South Wales the regulatory response has been to pass legislation mandating mortgagees to take on this role.

However for the frauds unique to NECS, the position is less clear. In these cases, because of the nature of the fraud, the entity best able to prevent identity fraud via identity verification techniques may not be the mortgagee. Take for example the situation where a fraudulent person is incorrectly registered as a Certifier and Subscriber of the NECS, giving the fraudulent person full access to the NECS and the opportunity to perpetrate fraud. It can be argued that the entity best able to prevent this type of fraud is the Gatekeeper Ca/RA, by verifying identity, because it is the entity responsible for issuing digital signing certificates to applicants and its designated role in NECS is to verify identity. Therefore it should be responsible for ensuring that the identity documents are in order. Contrast this to the situation where fraud occurs because the Certifier is careless in storing his/her private key and NECS user-id and password. Who should bear the responsibility then? The Certifier, or the Subscriber (if the Certifier is an employee of that Subscriber)? In all of this, it is likely that some homeowner would have his/her house fraudulently

mortgaged or sold. Thus the issue of allocation of liability within the NECS for these new types of frauds is more complex than for the traditional types of frauds because there are new entities<sup>92</sup> involved in the NECS and therefore new relationships to consider that is not present in the current conveyancing system.

This issue of liability allocation within the NECS and its participants was examined extensively in a consultation package in 2009. Prior to that consultation package, three other consultation packages were commissioned. The culmination of these four consultation packages is a report titled the *NECS Legal Framework Development Final Report*.<sup>93</sup> It is beyond the scope of this paper to discuss in detail the recommendations proposed by the final report. Generally, the report recommended using contract and service charters to govern the relationships between the various NECS stakeholders.<sup>94</sup> The report suggested that a contract, known as a Participation Agreement and Participation Rules, would be mandated to govern the relationship between the electronic lodgment network operator (ELNO)<sup>95</sup> and each Subscriber. This Participation Agreement would take effect as a bilateral contract between each Subscriber and the ELNO.<sup>96</sup> The Participation Agreement and Participation Rules would contain requirements with regard to other aspects of the NECS legal framework. For example, provisions setting out the Subscribers obligations under NECS, such as ensuring that all of its Users nominated as Certifiers comply with their rules and obligations under the Participation Rules could be contained in the Participation Agreement and Participation Rules. Obligations to perform client identity verification requirements would also be included the Participation Rules.<sup>97</sup>

With regards to the Subscriber and the Certifiers used by the Subscriber, the Report recommended that legal liability arrangement between these two parties be left to commercial negotiation and agreement.<sup>98</sup> The Report noted that because Subscribers control the choice of and terms of service of the Certifier, Subscribers should be responsible to other parties in the NECS for the Certifiers used by the Subscriber and that Subscribers can cover the risk of the Certifier's acts and omissions (including fraud) by taking out insurance and appropriate contractual arrangements with the certifier.<sup>99</sup> However, the report also suggested that Certifiers could enter into a subset of the Participation Agreement and Participation Rules (called the certifier agreement) with the ELNO under which they agree to certain obligations such as the safeguarding and use of their private key and use of the

<sup>92</sup> These entities are NECS stakeholders. The NECS stakeholders discussed in this paper are the NECS users, including subscribers and certifiers, Land Registries, the Gatekeeper CA/RA and the ELNO. However, the range of NECS stakeholders extend far beyond that, including stakeholders such as participating governments, regulators of industry professionals who conduct conveyancing the NECS, insurers of stakeholder liability in relation to NECS and Revenue Offices: Clayton Utz, *NECS Legal Framework Development*, Final Report Vol.1, 2010, [3].

<sup>93</sup> Clayton Utz, *NECS Legal Framework Development*, Final Report Vol.1, 2010. Details of the four consultation packages and stakeholders who responded can be found in this report.

<sup>94</sup> Clayton Utz, *NECS Legal Framework Development*, Final Report Vol.1, 2010, [6.3].

<sup>95</sup> It is currently envisaged that there will be one national ELNO, operated by a company owned by all of the jurisdictions and the ELNO will be authorised to operate an electronic lodgment network for land in each of the jurisdictions. Thus the ELNO is the entity that will be responsible for operating the system NECS: Clayton Utz, *NECS Legal Framework Development*, Final Report Vol.1, 2010, [1.1].

<sup>96</sup> Clayton Utz, *NECS Legal Framework Development*, Final Report Vol.1, 2010, [5.6], [10].

<sup>97</sup> Clayton Utz, *NECS Legal Framework Development*, Final Report Vol.1, 2010, [5.2] and Attachment 3, [4].

<sup>98</sup> Clayton Utz, *NECS Legal Framework Development*, Final Report Vol.1, 2010, [14].

<sup>99</sup> Clayton Utz, *NECS Legal Framework Development*, Final Report Vol.1, 2010, [16.2] and [17.1].

NECS system.<sup>100</sup> So it would appear that where the Certifier has been careless in keeping the private key safe and fraud occurs, the Subscriber and Certifier will be held responsible.

At the time of writing this paper, the Report has the status of independent advice and is currently being considered by all NECS stakeholders.<sup>101</sup> Victoria, which has developed its own electronic conveyancing system (Victorian ECV system), also use contractual rules (called the EC System Rules)<sup>102</sup> to govern the relationship between the various participants of ECV. However, the manner in which the EC System Rules allocate liability has been a source of discontent for some ECV stakeholders, namely the Law Institute and the Legal Practitioners Liability Committee, arguing that the EC Rules result in one-sided liability arrangements.<sup>103</sup>

Thus effective liability allocation arrangements can be a contentious issue and the successful uptake of NECS may ultimately depend on its stakeholders agreeing on the manner in which liability is divvied up in the NECS. Further research into this area is therefore timely and, in the authors' opinion, necessary. To that end, the loss allocation principles and framework discussed in this paper and adopted in the Report<sup>104</sup> provide a good starting point for analyzing effective liability allocation arrangements in the NECS.

## Conclusion

Over the past few years, studies have shown that identity fraud has grown to become a significant problem.<sup>105</sup> It is therefore unsurprising that many Australians are becoming more concerned about identity fraud. In a survey conducted in 2007 by the Wallis Consulting Group on behalf of the Office of the Privacy Commissioner, one of the issues examined in the survey was a series of questions concerning awareness and experience of identity fraud. More than 1,500 respondents took part in this survey. Nine per cent of those surveyed claimed they had been a victim of identity fraud whilst 17 per cent said they knew of someone who had been the victim. The survey also found that people aged between 35 and 49 were the most likely to have been the victim or know someone who has been a victim, with 60 per cent of Australians concerned that they may become a victim.<sup>106</sup> Within the arena of land transactions, the impact of identity fraud is no less devastating because its occurrence strikes at the very heart land registration system—security of title. The case examples used in this paper have shown that

<sup>100</sup> Clayton Utz, *NECS Legal Framework Development*, Final Report Vol.1, 2010, [5.6], [11].

<sup>101</sup> Email from Ann Kinnear (National Electronic Conveyancing Office) to Rouhshi Low, April 16, 2010. Thus for frauds resulting from incorrect registration of applicants to NECS, it was argued in this paper that Verisign should bear responsibility for these frauds as its role as Gatekeeper RA is to verify identity. However, it may be that this responsibility should be shared with the ELNO if the ELNO also has the responsibility of verifying identity, such as subscriber credentials and insurance and financial capacities of the subscriber: Email from Simon Libbis (National Electronic Conveyancing Office) to Rouhshi Low, June 24, 2010.

<sup>102</sup> State Government of Victoria EC, "Registration documents" [http://www.landexchange.vic.gov.au/ec/r\\_regdocs.html](http://www.landexchange.vic.gov.au/ec/r_regdocs.html) at April 16, 2010 [Accessed July 6, 2011].

<sup>103</sup> Clayton Utz, *NECS Legal Framework Development*, Final Report Vol.1, 2010, [15.2]. Also see Law Institute Victoria Submissions, "Electronic conveyancing Victoria" (September 10, 2007) <http://www.liv.asn.au/Membership/Practice-Sections/Submissions> at April 18, 2010.

<sup>104</sup> Clayton Utz, *NECS Legal Framework Development*, Final Report Vol.1, 2010, [4.2].

<sup>105</sup> Discussed in this paper in fn.7.

<sup>106</sup> Wallis Consulting Group, Office of the Privacy Commissioner Australia, "Community Attitudes to Privacy", 2007, 66–67.

identity fraud in land transactions can occur in many different ways, with the effect of the victim of the fraud either losing title or finding his/her title being encumbered with a mortgage.

This paper has examined the processes that can be put in place by stakeholders within the land registration system to verify identity so as to prevent the occurrence of identity fraud in land transactions without compromising the efficiency of the system. The approach taken by this paper is to say that it is through the adoption of these identity verification processes that there will be greater reliance and increased confidence in the system, and this is critical for its future when it moves to an electronic environment. To this end, this paper examined the three major principles behind economic efficiency and the allocation of loss in cases of forgery to develop a framework to determine the most appropriate individual(s) on whom to apportion loss. Our finding from this examination is that the mortgagee should primarily bear the risks associated with identity fraud. In terms of the level of identity verification required to meet this obligation, this paper examined various State and Federal initiatives for the verification of identity and found that the Australian Government's Gold Standard on identity verification should be adopted as the standard for identity verification as it is consistent with the policy rationale of certainty of title and meets the allocation of loss principles examined in this paper. Should the NECS be implemented, it is suggested that mortgagees continue to bear the loss for the types of identity frauds that currently occur in the land registration system and that the Federal Government's Gold Standard should be used in the NECS. However, what this paper highlights is that it is entirely possible that under an electronic system the allocation of risk and liability will fall on the stakeholders involved in consummating the transaction, rather than the landowner. The tension between these stakeholders (including conveyancers, lawyers, registry offices, issuers of identity and the government) as to this allocation of risk is palpable and will demand sensitive negotiation and much introspection and examination as we embrace the efficiency, advantages, and complexity of the national electronic conveyancing system.

The matter is now under investigation by five government agencies: ([http://www.commerce.wa.gov.au/Corporate/Media/statements/2010/September/Intensive\\_joint\\_investigation\\_.html](http://www.commerce.wa.gov.au/Corporate/Media/statements/2010/September/Intensive_joint_investigation_.html) [Accessed September 28, 2010]). The matter has also been raised in the English Parliament, see *Hansard*, HC, col.238–246 (November 7, 2007) "Land Title Transfers" at 245. The currency of this examination in Australia is also highlighted by the reference from the National Electronic Conveyancing Office to KPMG in June 2010 to establish a single client identification verification standard. See NECS press, "Work on an Identity Verification Standard Kicks Off", Issue 49, June 2010.



## Immediate indefeasibility — Is it under threat?

*Rouhshi Low and Lynden Griggs\**

*Immediate indefeasibility has been adopted in Australia for close to 40 years. Recently however, and against the backdrop of economic fragility and global deregulation, there has been a polite questioning of its place. In Australia, some may argue that case law developments and legislative reform have placed indefeasibility under the microscope — in New Zealand, a similar telescoping by the respected views of their Law Commission. This note examines these reforms. It concludes that these reforms do not place immediate indefeasibility under threat. Rather, they modify and adapt the doctrine to fit within the context of contemporary financial instruments. Nevertheless, changes have so far been piecemeal, and its time for a consistent and logical examination of this issue to occur on the national, rather than the stage of each state.*

### Introduction

The land registration systems that operate in Australian states are rarely the subject of interest to talk back radio, current affairs shows, or the public. However, this all changed recently in Western Australia. Considerable publicity and angst amongst the community of Perth was seen when a property owner, living in South Africa and owning investment properties in Western Australia, discovered that he had been the subject of a swindle that saw his property being sold without his knowledge. What occurred was that fraudsters from Nigeria intercepted documents on route to the true owner. Pretending to be him, they then, through a series of emails and telephone calls contracted with a real estate agent in Perth to sell the property. The property was ultimately sold, and the proceeds of sale moved to an offshore bank account. The true owner was only alerted when his second property was put on the market and a neighbour alerted him of this fact. While undoubtedly regrettable, it must be remembered that the possibility of identity fraud has been present in whatever land registration system one adopts. Perhaps what should be seen as unusual is that the matter of mortgage fraud has not attracted greater attention. After all, statistics indicate that some 21% of all serious fraud involves mortgage fraud.<sup>1</sup> Similarly, the determining cases on land law synopses throughout Australia and New Zealand would feature cases from the late 1890's to the present day: *Gibbs v Messer*,<sup>2</sup> *Fraser v Walker*<sup>3</sup> and

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<sup>1</sup> P Watkins, *Fraud in Conveyancing*, paper presented at the Australian Institute of Conveyancers, 2007 National Conference, March 2007, quoting from R Smith, *Serious Fraud in Australian and New Zealand*, Research and Public Policy Series No 48, Australian Institute of Criminology and PricewaterhouseCoopers, 2003, cited in New Zealand Law Commission, *A New Land Transfer Act*, June 2010, n 33.

<sup>2</sup> [1891] AC 248; [1891–4] All ER Rep Ext 2047.

*Breskvar v Wall*.<sup>4</sup> Respectively, these involved a solicitor utilising the identity of a non-existent Cameron in an attempt to defraud Mrs Messer; Mrs Fraser forging the signature of her husband, and Wall having his identity taken by one Petrie. In one way or another, all cases, extending from the 1890's to 2010 in Western Australia involve, directly or indirectly, someone assuming or fraudulently taking the identity of another. A problem only exacerbated today with the rise of social networking sites and the seeming comfort of millennial children (the next generation of property owners) to disclose personal details to the world at large.

For at least 40 years, the resolution of the underlying property disputes to these scenarios (usually, the context is whether the mortgagee can realise their security against the true owner) has been guided and informed by the operation of immediate indefeasibility — the notion that title by registration cures any invalidity in the preceding instruments. In 1971, the High Court of Australia accepted that this was the doctrine of choice for Torrens system registration.<sup>5</sup> While one may have thought that this would end the debate, at least until legislative reform or an overruling by our highest judicial body, argument continues, at least in academic circles, as to the correct role and place for immediate indefeasibility and its effect on land transactions. For example, we see O'Connor describing the controversy between immediate and deferred indefeasibility in terms of a bijural ambiguity,<sup>6</sup> jurisdictions differing as to whether indefeasibility should be deferred or immediate,<sup>7</sup> Zhixiang considering its operation uncertain<sup>8</sup> and in the somewhat analogous context of English registered land, as 'statutory magic'.<sup>9</sup> In addition to this, or perhaps because of it, we see the academic community and law reform bodies<sup>10</sup> suggesting that irrespective of whether deferred or immediate indefeasibility is adopted, there should, in addition, be a discretion to override this should the result of that application be deemed unfair.<sup>11</sup> Despite these concerns about how it should be applied, the High Court's description of indefeasibility as the 'foundation of Torrens system'<sup>12</sup> continues to this day,<sup>13</sup> with immediate indefeasibility also seemingly endorsed by the Property Law

3 [1967] 1 AC 569; [1967] 1 All ER 649; [1967] 2 WLR 411; [1967] NZLR 1069.

4 [1971] 126 CLR 376; [1972] ALR 205; (1971) 46 ALJR 68; BC7100630.

5 *Breskvar v Wall* (1971) 126 CLR 376; [1972] ALR 205; (1971) 46 ALJR 68; BC7100630.

6 P O'Connor, 'Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Title Systems', (2009) 13 *Edinburgh L Rev* 194.

7 Australia has accepted immediate indefeasibility, some Canadian provinces are immediate, some deferred, and differences exist between Singapore and Malaysia. See generally O'Connor, above n 6; L Griggs, 'Resolving the Debate Surrounding Indefeasibility through the Eyes of a Consumer', (2009) 17(2) *APLJ* 259.

8 S Zhixiang, 'Rationalising the Singapore Torrens System' (2008) *Singapore Jnl of Legal Studies* 165 at 166.

9 P Matthews, 'Registered Land, Fraud, and Human Rights' (2008) 124 *LQR* 351 at 351.

10 See the comments and sources cited by M Harding and M Bryan, 'Responding to Fraud in Title Registration Systems: A Comparative Study' in M Dixon (Ed), *Modern Studies in Property Law — Volume 5*, Hart Publishing, Oxford, 2009, pp 3, 10.

11 Another approach can be seen with Ontario, who, when introducing electronic registration diluted the effect of indefeasibility by statutorily modifying the legislation so that deferred indefeasibility became the norm. B Arruñada, 'Leaky Title Syndrome' (2010) *New Zealand L Jnl* 115 at 116.

12 *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at 613; 78 ALR 1; 62 ALJR 268; BC8802595.



Reform Alliance in the early stages of its draft uniform Torrens Code.<sup>14</sup> However, potential for unfairness is patent and overt with this unfairness the reason why calls continue for reform or rejection of immediate indefeasibility.<sup>15</sup> This inequity is dramatically amplified in Queensland, South Australia, Victoria and Western Australia where the landowner, subject to fraud by an imposter, may be sued in a personal capacity for the debt incurred by the deceiving party.<sup>16</sup> This conclusion seems implausible and has not been accepted in New South Wales, New Zealand and Canada.<sup>17</sup> Despite this, the NSW Supreme Court has described, in emphatic fashion, the importance of indefeasibility:

Indefeasibility of title is the most fundamental feature of the land registration system in Australia. Under it, the state guarantees the title of those with a registered interest in land, to the extent of that interest. The foregoing is trite. But the principle is so important, and adherence to it so essential, that registered title is able to be challenged, under the legislative provisions in each of the states, only in the most exceptional circumstances. The Torrens system has enabled conveyance with certainty in Australia, and even though there may be occasions where notions of comparative justice may seem to have been transgressed, it is essential that indefeasibility of title is not undermined.<sup>18</sup>

What we seek to do in this brief note is show how the legislative responses to immediate indefeasibility have, rather than sounded the death knell to the doctrine, in fact merely responded to the underlying and contemporary financial deregulation that currently exists in Australia. In so doing, they have sought to make sense of the confusing morass of case law that is emanating out of the states. While response to this bayou has differed from jurisdiction to jurisdiction, all responses have, we believe, as their motif, the protection of the land registration system that has served Australia well for over 150 years, with at least 40 of those guided by immediate indefeasibility. Our thesis is that immediate indefeasibility has not been weakened by recent actual and proposed changes, merely morphed into a doctrine suitable for the context in which it necessarily sits.

## Case law developments

### Victoria

The Victorian position is represented by the decision of *Tarik Solak v Bank of Western Aust Ltd*.<sup>19</sup> An imposter, pretending to be Solak and having obtained

<sup>13</sup> *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; 236 ALR 209; [2007] HCA 22; BC200703851.

<sup>14</sup> See Property Law Reform Alliance, at <www.plra.com.au> (accessed 2 June 2010).

<sup>15</sup> *Perpetual Trustees Victoria Ltd v English* [2009] 14 BPR 26,675; [2009] NSWSC 478; BC200904808 at [156].

<sup>16</sup> For a current analysis of this issue surrounding the right of a mortgagee to pursue a landowner who has a mortgage attached to the land by a fraudster, see M Harding, 'Property, Contract and the Forged Registered Mortgage' (2010) 24 *New Zealand Universities L Rev* 22.

<sup>17</sup> See the discussion by Harding, *ibid*, at 29–31.

<sup>18</sup> *Perpetual Ltd v Barghachoun* [2010] NSWSC 108; BC201000922 at [25].

<sup>19</sup> [2009] VSC 82; BC200901550.

possession of the duplicate certificate of title and passport and driver's licence, obtained a loan from the Bank of Western Australia. It advanced some \$560,000 to the imposter. The bank registered a mortgage over the land. Most of this money had been withdrawn by the time the fraud was discovered. The documents used to create and register the mortgage were standard financial documentation. The loan contract was an offer from the bank to 'you' the borrower. The imposter acting as 'Mr Solak' identified himself as the borrower. The mortgage instrument did not identify the receipt of an actual sum of money, this being \$560,000. Rather the borrower was liable to repay the *amount owing*, with this defined in the registered mortgage document as 'all monies which you owe the Bank for any reason, under or in relation to a bank document . . .'. Bank document was defined to include an agreement or arrangement under which you incur or owe obligations to the bank.

Solak's argument was simple. He had not assumed any obligation to the bank. Therefore, he was not a party to a bank document. The document was void for fraud. There was no amount owing. Indefeasibility was for nothing, he had an in personam right, supported by authority in New South Wales to have the mortgage discharged. Despite what may be a natural tendency to accept each proposition within this logical and linear progress towards justification of the position of Solak, the Victorian Supreme Court rejected these arguments. The use of the word 'you' was merely a drafting device. In this instance, the 'you' was the imposter and the position would have been the same had Mr Solak been addressed in the documents by name. In effect, the policy of immediate indefeasibility was to be given its full force. The bank had obtained by registration, the benefit of that doctrine and no exceptions could apply to them. Despite the certainty by which this conclusion was reached, criticism was swift and stinging. For example, the NZ Supreme Court in *Westpac Banking Corporation v Clark*,<sup>20</sup> a decision, which on the material facts for present discussion, could not be distinguished from *Solak* said as follows in respect of the reasoning of the Victorian court:

It is erroneous to interpret the loan contract as addressing the imposter and then to work backwards by transferring that interpretation to the registered documents merely because the language is common to all. The fact that 'you' in the loan contract is the imposter cannot possibly affect what 'you' means in the registered documents. . . . The registration of a forged mortgage and the consequent indefeasibility of the charge cannot extend the scope of the intended linkage when the 'you' in the mortgage is the registered proprietor. The covenant to pay in the loan contract was not secured under the mortgage . . . its indefeasible charge secured nothing.

### New South Wales authority

By contrast to the Victorian position, and arguably emblematic<sup>21</sup> of the position in New South Wales is *Perpetual Trustees Victoria Ltd v English*.<sup>22</sup>

<sup>20</sup> [2009] NZSC 73 at [49].

<sup>21</sup> The matter has been raised in a large number of cases. See *Chandra v Perpetual Trustees Victoria Ltd* (2007) 13 BPR 24,675; [2008] NSWSC 178; BC200801332; *Provident Capital Ltd v Printy* (2008) 13 BPR 25,199; [2008] NSWCA 131; BC200804171; *Vella v Permanent Mortgages Pty Ltd* (2008) 13 BPR 25,343; [2008] NSWSC 505; BC200803886. As to how

The facts are simple and all too familiar. Mr English forged his wife's signature to a loan with Perpetual Trustees. Who should bear the loss, Ms English or the financial institution? The NSW Court of Appeal held in favour of Ms English. The document in question provided that 'I agree to pay the Secured Money . . .'. The definition of secured money included all amounts payable under the agreement secured by the mortgage. The offer document sent to Mr English required that to accept the offer, 'you, and if there is more than one person, all of you, must sign'. The conclusion of the court was that as Ms English had never signed, the loan agreement was never validly created. The registered mortgage secured nothing. Perpetual was left with a claim against the now bankrupt Mr English's interest in the property.

This case can be compared with the recent NSW Court of Appeal decision in *Registrar General of NSW v Van Den Heuvel*.<sup>23</sup> In facts largely similar to the above case (a husband forging a wife's signature), the NSW Court of Appeal, in a 2:1 decision, concluded that the mortgage secured a debt under a secured agreement and because of this, the wife's interest in that land was charged with that security. Importantly, in terms of distinguishing this from *English*, the definition of 'Secured Agreement' was interpreted to mean 'Any present or future agreement between me or us, or any one of us, and You, or any agreement which varies such an agreement'. The expression, 'me, or us, any one of us', was 'apt to refer to the persons named as mortgagors, that is the husband and the wife, or either of them'.<sup>24</sup> By contrast, in *English*, the loan offer was only capable of acceptance if both parties to whom the offer was addressed signed the acceptance, and only one of them had done so. For this reason, *English* could be distinguished. Young J in *Van Den Heuvel* concludes:

The balance of probabilities is that in the light of past history in the industry, the possibility that the wife's signature was forged or that the loan was unenforceable against the wife would have occurred to Perpetual. It would more likely than not accept that in that situation, so long as the husband was bound, it was commercially appropriate to lend out the money.<sup>25</sup>

The dissent of Basten J was equally comprehensible.<sup>26</sup> It was not possible to infer that there would be a concluded agreement in the absence of signing by both husband and wife. From the contractual material the fact that both husband and wife were joint tenants and the husband's belief that forging his wife's signature was necessary to receive the monies, the conclusion that was reached in *English* (ie, indefeasibility for nothing) was to be preferred. Addressing the policy implications that a registered mortgage achieved little if his Honour's view was to be accepted, Basten J stated:

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changes in the language can alter the outcome, see *Van Den Heuvel v Perpetual Trustees Victoria Ltd* [2010] NSWCA 171; BC201005096. See S Schroeder and P Lewis, 'Indefeasibility of title and invalid all moneys mortgages: Determining whether invalid personal covenants to pay are protected under the indefeasibility umbrella', (2010) 18 *APLJ* 185.

22 [2010] ANZ ConvR 10-015.

23 [2010] NSWCA 171; BC201005096.

24 [2010] NSWCA 171; BC201005096 at [4].

25 *Ibid*, at [168].

26 *Ibid*, at [51]–[70].

This conclusion does not undermine the security of the Register, nor the ability of a transferee of the security to obtain a good title to the mortgage. As explained by Sackville AJA in *English* at [97]:

‘It is true that the consequence of the invalidity of antecedent documentation may produce the result that a registered mortgage does not secure a debt. But that is the situation where a mortgagor repays the mortgage debt, yet the mortgage remains undischarged.’<sup>27</sup>

## Legislative proposals

### New South Wales legislation

Legislation in New South Wales has been passed, but not yet commenced, designed to reinforce what we see as the operation of immediate indefeasibility, while at the same time imposing responsibility on those who are most able to do this. Section 56C of the Real Property and Conveyancing Legislation Amendment Act 2009 provides that the mortgagee must take reasonable steps to ensure that the person who executed the mortgage, or on whose behalf it has been executed as mortgagor, is the same person as the registered proprietor of the land. The legislation will indicate that compliance with the regulations will meet this standard, and that a failure to do this may lead to a recording being cancelled: s 56(6). The regulations are yet to be passed, but a consultation paper released by the Land and Property Management Authority of New South Wales<sup>28</sup> sought discussion on the level of identity verification that should be imposed on mortgagees. The concluded view of this paper was that the verification regime should contain the following elements:

- 1) A face to face interview with the mortgagor(s);
- 2) Document based verification rather than verification by electronic data;
- 3) A minimum of two and preferably three identification documents (one of which should contain a photograph);<sup>29</sup> and
- 4) Original documents must be sighted, rather than certified copies.<sup>30</sup>

Recently, New South Wales has also announced enhanced security measures in respect of certificates of title. Part of the measures includes a new watermark and a security trustseal designed specifically for certificates of title.

### Queensland legislation

Section 11A of the Land Title Act 1994 has a similar intent as the NSW legislation, and does predate by some years, the NSW reforms. However, there is a critical difference, and one that we endorse. This legislation expressly

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<sup>27</sup> Ibid, at [57].

<sup>28</sup> Land and Property Management Authority NSW, Consultation Paper Confirmation of Identity — Sections 56C and 117 of the Real Property Act 1900, 21 December 2009.

<sup>29</sup> Satisfactory documents to meet the requirements of the photographic ID are stated to be and Australian passport (current or expired in last 2 years); an Australian driver’s licence; a NSW photo card or an Overseas passport. Land and Property Management Authority NSW, *ibid*, p 3.

<sup>30</sup> Land and Property Management Authority NSW, *ibid*, p 4.

provides that a failure to undertake the verification steps will see a mortgagee unable to rely on indefeasibility: s 185(1A). The New Zealand Law Commission has suggested that similar reforms be adopted in their jurisdiction. As the commission notes:

We are ... of the view that it is prudent to impose a legislative requirement on mortgagees to take reasonable steps to check that they are dealing with the actual registered owner and not with a fraudster. This may go some way towards preventing mortgage fraud becoming widespread. Mortgagees are also usually the 'cheapest cost avoider' and are usually in a better position to prevent fraud than is a registered owner. They can ensure that providing a loan is conditional upon proof of the borrower's identity.<sup>31</sup>

## Law reform proposals

### New Zealand

The New Zealand Law Commission, in its recent report *A New Land Transfer Act*,<sup>32</sup> undertake a brief examination of the operation of immediate indefeasibility. In reforming the law, four options were outlined:

- i) Immediate indefeasibility, whereby registration would cure any forged or otherwise invalid instrument (ie, retention of the current position);
- ii) Immediate indefeasibility with a discretion to order alteration;
- iii) Deferred indefeasibility, whereby the original owner could defeat the title of an innocent purchaser or mortgagee where that title was obtained from a forged or otherwise invalid instrument (as adopted in some Canadian jurisdictions); and
- iv) Immediate indefeasibility subject to statutory exceptions.<sup>33</sup>

Option two was preferred. Only a small number of submitters favoured retention of the status quo, with a small number preferring deferred indefeasibility. However, as the commission noted, '[d]eferred indefeasibility is the approach adopted in some Canadian provinces like Ontario and New Brunswick, but there have been subtle differences in its application, and it suffers from complexity and lack of clarity'.<sup>34</sup> Accordingly, it was suggested that cl 13 of the new Act be in the following terms:

- (1) This section applies to a person (**person A**) —
  - a) who has been deprived of an estate or interest in land through the registration under a void or voidable instrument of another person (**person B**) as the owner of the estate or interest; or
  - a) whose estate or interest in land has been adversely affected by the registration under a void or voidable instrument of another person (**person C**) as the owner of an estate or interest in land.
- (2) The court may on the application of person A, make an order cancelling the registration of person B or person C as the owner of the estate or interest . . .

31 New Zealand Law Commission, *A New Land Transfer Act*, June 2010, at [2.20].

32 Ibid.

33 Ibid, Ch 2.

34 Ibid, at [2.9].

- (4) The court may make an order only if it is satisfied that it would be manifestly unjust for person B or person C to remain registered owner of the estate or interest.

Subsection 7 goes on to consider a range of factors that can be taken into account in considering whether something is manifestly unjust. These include, amongst others, the circumstances surrounding the acquisition, the nature of any improvements, the time someone has been in occupation, the identity of the person in occupation, and the conduct of the parties.

### Choices going forward

The financial deregulation that brought us a global economy and the produce and services of nation states to our doorstep has undoubtedly and, to be expected, some downsides. One such downside is evident in what happened in Perth. A person, residing peacefully in South Africa, could expect that the chance of having their Australian property sold without their authority, and without any possibility to recover the land itself would be negligible. All too tragically for this man, his understandable reliance on what many would think would be the accepted position was sadly mistaken. Monetary compensation was his only recourse. Immediate indefeasibility was to prevail. The same result was occasioned upon Solak and Van Den Heuvel, with the mortgagees enduring the pain in cases such as *English*. Given this inconsistency, what should occur? First, the changes made in Queensland seem a worthwhile initiative and involve little extra compliance for mortgagees. They should prevent the endemic growth of mortgage fraud. Second, and perhaps allied to this, mortgagees need to look for ways so that the technical deficiencies of their mortgage documentation (particularly in the case of ‘all moneys’ mortgages) are overcome. Incorporation of allied documents by direct reference, or perhaps a ‘return to the future’ of reliance on mortgages for a specific amount, with this quantum incorporated by express mention in the registered documents may also be a result of the current tsunami of litigation on forged mortgages. Third, enhanced and modern security features should be incorporated in land and other identity documents. No system will ever be fool proof, but the greater the obstacles, the commensurate reduction in the number of people who can access the resources to undertake the fraud. Fourth, consideration should be given to dual or multi factor authentication whereby someone assuming or claiming title to land would be required to produce not only evidence of identification, but meet a standard of authentication. In this context, it can be noted that authentication techniques can be broken down into three categories:

- i) Something you have (such as a certificate of title, or smartcard);
- ii) Something you know (such as password or PIN); and
- iii) Something you are (biometric facilities — facial image, retinal scan for example).

Arguably land transactions need to require at least two of these, and if the concern is so great, and the damage to the system so extensive, then possibly all three. However, the authors do not downplay, in any way, the difficulties in achieving this. Land transactions, at least for most natural persons, are conducted with a level of infrequency that any increase in security would need

to be balanced with operational requirements. A system so intrusive that legitimate persons are put to an unduly burdensome onus only imposes costs within a competitive market that may not match the corresponding benefits. Accordingly, what may be critical as these matters are debated in the context of the National Electronic Conveyancing system is how the owner of land should be involved in determining the appropriate level of security.

Finally, we would argue for the introduction of a general discretionary provision as has been suggested in New Zealand that would also serve to ameliorate the most obvious of unfair results. In many cases, the mortgagee will be fairly compensated in monetary terms, yet the pain felt by the true owner's eviction may never be fully met by financial settlement. All of these measures do not impinge, weaken or mollify immediate indefeasibility. What they do is place this doctrine within modern times. Immediate indefeasibility is not under threat from these developments, merely adapting to contemporary needs. Recognition of this could see greater consistency amongst the cases, and a uniform response from the legislature. Given the incremental nature of common law evolution, its time our parliamentarians seriously began to examine this issue. The impending arrival of electronic conveyancing only serves to remind us that the time is opportune for this assessment to occur.

# Identity Verification in Conveyancing: The Failure of Current Legislative and Regulatory Measures, and Recommendations for Change

Rouhshi Low

Lynden Griggs\*

## Abstract

*“Defrauding land titles systems impacts upon us all. Those who deal in land include ordinary citizens, big business, small business, governments, not-for-profit organisation, deceased estates... Fraud here touches almost everybody.”<sup>1</sup> The thesis presented in this paper is that the current and disparate steps taken by jurisdictions to alleviate land fraud associated with identity-based crimes are inadequate. The centrepiece of the analysis is the consideration of two scenarios that have recently occurred. One is the typical scenario where a spouse forges the partner’s signature to obtain a mortgage from a financial institution. The second is atypical. It involves a sophisticated overseas fraud duping many stakeholders involved in the conveyancing process. After outlining these scenarios, we will examine how identity verification requirements of the United Kingdom, Ontario, the Australian states, and New Zealand would have been applied to these two frauds. Our conclusion is that even though some jurisdictions may have prevented the frauds from occurring, the current requirements are inadequate. We use the lessons learnt to propose what we consider core principles for identity verification in land transactions.*

## Introduction

In 2010, we wrote about the disparate measures taken by Australian and other common law jurisdictions to reduce or alleviate the incidence of title and/or mortgage fraud within land transactions.<sup>2</sup> In that article we argued that the primary responsibility for loss caused by identity fraud in land transactions should lie with the mortgagee. We also recommended that the level of identity verification should be that of the Australian Government’s gold standard on client identification. This article builds on that earlier work in the following manner: first, by testing current identity verification requirements across the Australian jurisdictions as well as the

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<sup>1</sup> Adam Graycar and Russell Smith, Identifying and Responding to Electronic Fraud Risks, 30th Australasian Registrars’ Conference, Canberra, November 13, 2002, 1.

<sup>2</sup> Lynden Griggs and Rouhshi Low, “Identity fraud and land registration systems: an Australian perspective” [2011] 75 Conv. 285, 285–308.



United Kingdom, Ontario and New Zealand against two recent but very different fraud scenarios. What will be seen is that the approach taken in the jurisdictions where the frauds occurred did not prevent the fraud happening, but importantly, this article will also show that had the frauds played out in the other jurisdictions, the same conclusions would have been reached. We will argue that this test confirms our findings in the 2010 article that what is critical is face-to-face verification of identity. However, this test will also point to the need for expanding the burden of identity verification. Whilst we are still of the opinion that mortgagees are still best placed to prevent identity fraud, we will argue in this article that those who profit from the conveyancing process (banks, conveyancers, real estate agents and individual buyers and sellers) all have a role to play in reducing the incidence of identity based crimes and should correspondingly share part of the burden. The result of this analysis is that we will take the lessons learnt from the practical application of the two fraud scenarios to identity verification requirements to propose what we consider core principles of identity verification.

### The matter is not unique to Torrens based systems

Whilst we recognise that the registration of “forged mortgages under the Torrens system is a surprisingly common phenomenon”<sup>3</sup> the issue is not exclusive to this system. For non-Torrens jurisdictions such as the United Kingdom<sup>4</sup> and the United States,<sup>5</sup> land fraud is equally visible with a long history. In Australia where land is now valued at AU \$3614 billion,<sup>6</sup> and housing loan commitments amount to AU \$14,465 million,<sup>7</sup> the role, and perhaps more importantly, the interest of all stakeholders in reducing the likelihood for fraud and correctly allocating loss when fraud inevitably occurs is of critical importance. In this country where on average there will be one mortgagee fraud occurring in every 133,000 transactions and one title fraud every 350,000 dealings<sup>8</sup> the likelihood of an owner losing ownership of their castle is undoubtedly small.<sup>9</sup> Figures from the United Kingdom<sup>10</sup> and New Zealand<sup>11</sup> also show relatively low levels of fraud in numeric terms—the table below presents the figures from the United Kingdom.

<sup>3</sup> *Perpetual Trustee v English* [2010] NSWCA 32 at [7].

<sup>4</sup> Land fraud in the United Kingdom can be traced as far back as 1306 (Bernadette Hewitt, “A Tangled Web: Land Registration and the Facilitation of Fraud—the England and Wales Perspective”, forthcoming in, *Property and Sustainability*, (Thomson Reuters, 2011)). Recently property title fraud cost the land registry office some £26 million (Simon Goodley, “Property title fraud costs Land Registry £26ml in compensation”, *The Observer*, May 15, 2011).

<sup>5</sup> This saw large sections of what is now Mississippi sold to land companies for considerably less than the market value. The matter not played out until the United States Supreme Court in *Fletcher v Peck* deciding that the legislation rescinding the land sales was constitutionally invalid (the third parties having bought from the land companies successful in their arguments promoting the sanctity of the contract): *Fletcher v Peck* 10 U.S. 87 (1810).

<sup>6</sup> Australian Bureau of Statistics, 5204.0, Table 61, June 2010.

<sup>7</sup> Australian Bureau of Statistics, 5609.0 November 2010.

<sup>8</sup> NECDL’s Client Identity Verification Solution, Presentation to the Law Institute of Victoria, Melbourne, February 25, 2011.

<sup>9</sup> Looking more broadly at identity frauds, the Australian Bureau of Statistics report into Personal Fraud indicated that in the 12 months prior to the survey, identity fraud accounted for 3 per cent of all personal frauds (approximately 499,500 victims). Australian Bureau of Statistics, 4528.0 *Personal Fraud*, 2007.

<sup>10</sup> Obtained under Freedom of Information legislation, April 1, 2011.

<sup>11</sup> Figures supplied indicate 10 claims were collectively made in the years 2001, 2002, 2008–2010. Thanks to Mr Rod Thomas, for supplying the information that he had previously obtained under a Freedom of Information application in New Zealand (email correspondence, May 12, 2011).

	00/01	01/02	02/03	03/04	04/05	05/06	06/07	07/08	08/09	09/10
<i>Substantive Applications</i>	3,477,328	3,965,381	4,560,130	5,253,748	5,544,970	5,329,436	5,638,226	5,222,175	4,237,648	3,361,998
<i>Fraud and Forgery</i>	9	7	4	12	15	31	24	60	62	53

Despite these low levels of fraud, and low likelihood of risk for any one person, there is no doubting the catastrophic impact that losing title to one's home would have on that individual—irrespective of the availability of compensation. In the next section we outline two recent scenarios that differed in outcome and in application as to how the fraud occurred. Following this, we apply current identity verification requirements of the United Kingdom, Ontario, the Australian states, and New Zealand and consider whether any of these would have minimised or alleviated the opportunity for the fraud to occur.

## Part 2: Constructing a modern land fraud—a tale of two ways.

### *Tale 1: Queensland: the Perrin fraud—one spouse forging the partner's signature (the typical fraud)*

The fraud that occurred in Queensland in 2008 involving the husband forging the wife's signature on two mortgages in respect of property owned by the wife is a textbook example of the type of fraud that is familiar and prevalent in many common law jurisdictions.

### Facts

Mrs Perrin was the registered owner of a property situated in Surfers Paradise, Queensland. In June 2008, the Commonwealth Bank lent AU \$10 million to Mr Perrin and later this amount was further increased by AU \$3.5 million.<sup>12</sup> The bank made those loans to Mr Perrin based on a guarantee by Mrs Perrin and mortgages over the property that Mrs Perrin owned.<sup>13</sup>

In 2009, Mr Perrin declared himself bankrupt and following default, the Bank sued to recover under the guarantee as well as seeking declaratory relief as to the enforceability of the mortgages.<sup>14</sup> Mrs Perrin denied ever signing mortgages over the property. She claimed that her signature on the two mortgage documents and on the guarantee was forged. Lawyers for Mrs Perrin also claimed that the signatures of Mr Perrin's brother, solicitor Fraser Perrin, who purportedly witnessed the security documents, were also forged.<sup>15</sup>

<sup>12</sup> *Commonwealth Bank of Australia v Perrin* [2011] QSC 274 at [1].

<sup>13</sup> *Perrin* [2011] QSC 274 at [2].

<sup>14</sup> *Perrin* [2011] QSC 274 at [3].

<sup>15</sup> *Perrin* [2011] QSC 274 at [2].

## Modus operandi

For the first mortgage, an employee of the Bank, Michael Parker, went to the property on May 16, 2008 with documents contained in three envelopes, including one envelope for Mrs Perrin.<sup>16</sup> Mrs Perrin was leaving the property as Mr Parker arrived. Mr Parker spoke to Mrs Perrin but did not say that he had documents for her to sign and did not give her the envelope addressed to her.<sup>17</sup> Instead, after Mrs Perrin had left the property, Mr Parker gave all of the documents to Mr Perrin, including the envelope addressed to Mrs Perrin.<sup>18</sup> Perrin Partners also released the certificate of title into the custody of Mr Perrin. The solicitors did not require a signature from Mrs Perrin.<sup>19</sup> According to McMurdo J. it was probably on May 16, 2008 that the certificate of title as well as the documents relating to the first mortgage which were delivered to the house on May 16 were handed to the bank. The documents, including the first mortgage, purportedly bore Mrs Perrin's signature and Fraser Perrin purportedly witnessed the signature.<sup>20</sup> A similar scenario occurred for the second mortgage.<sup>21</sup> McMurdo J. concluded that the signatures of Fraser Perrin as well as that of Mrs Perrin were forgeries.<sup>22</sup>

## What enabled the fraud?

Clearly the critical factor enabling the fraud was the leaving of the security documents including the mortgages with Mr Perrin, the lack of contact by the bank with Mrs Perrin regarding the mortgages, and the failure to insist that Mrs Perrin's signature be witnessed by an employee of the bank. These activities provided Mr Perrin with the opportunity to forge both Mrs Perrin's signature on the documents as well the signature of the purported witness.

Another factor was the release of the certificate of title to Mr Perrin without requiring a signature from Mrs Perrin. In Queensland, the issuing of the paper certificate of title is optional—it is only issued following the registration of a dealing if requested by the registered proprietor.<sup>23</sup> However, where a certificate of title has been issued, it must be returned to the titles registry office for cancellation prior to the registration of an instrument (including a first or subsequent mortgage) in the freehold land register.<sup>24</sup> Had the solicitors requested Mrs Perrin for a release signature, the fraud might have been prevented. Mrs Perrin might have started making enquiries as to why the certificate of title was needed and this might have uncovered Mr Perrin's fraudulent plans.<sup>25</sup>

<sup>16</sup> Fifth Amended Defence and Counterclaim filed on behalf of the defendant, April 19, 2011, p.7.

<sup>17</sup> Fifth Amended Defence and Counterclaim filed on behalf of the defendant, April 19, 2011, p.7.

<sup>18</sup> *Perrin* [2011] QSC 274 at [25].

<sup>19</sup> *Perrin* [2011] QSC 274 at [26].

<sup>20</sup> *Perrin* [2011] QSC 274 at [27].

<sup>21</sup> *Perrin* [2011] QSC 274 at [30].

<sup>22</sup> *Perrin* [2011] QSC 274 at [103]–[104].

<sup>23</sup> Section 42 of the Land Title Act 1994 (Qld). According to the Queensland Department of Environment and Resource Management, they were 546,974 applications for certificates of titles made between April 24, 1994 and July 28, 2011. Many of these would have been subsequently cancelled under s.154(1) of the Land Title Act 1994 (Qld) but the Department is unable to ascertain how many would have been subsequently cancelled. As at July 28, 2011, less than 17 per cent of lots currently have a certificate of title. This information was provided to the authors on July 28, 2011: email from Shradha Prasad to Rouhshi Low, July 28, 2011.

<sup>24</sup> Section 154(1) of the Land Title Act 1994 (Qld).

<sup>25</sup> It is beyond the scope of this paper to discuss the role played by the paper certificate of title as a safeguard against fraud. However the move towards electronic conveyancing systems by various jurisdictions including the United Kingdom and Australia has made this a live issue. Questions have been raised as to whether abolishing the paper

## The arguments made by Mrs Perrin

At first, it is critical to note that Queensland denies the benefits that flow from registration of an interest where the mortgagee has not taken reasonable steps.<sup>26</sup> Accordingly, counsel for the bank initially argued and pleaded a case that it had taken reasonable steps to verify identity and therefore it should be entitled to the protection of registration (s.11A of the Land Title Act 1994). Whilst the argument surrounding the application of s.11A was not pursued at trial,<sup>27</sup> the further and better particulars associated with the claim indicate the direction that this argument would have taken if it had proceeded. In these pleadings, lawyers for Mrs Perrin argued that for the first mortgage Mr Parker should have been alert to the fact that Mrs Perrin did not appear to know of the proposed guarantee and mortgage, was not immediately available to obtain legal advice in relation to the guarantee and mortgage, and was not then immediately available to sign the proposed guarantee and mortgage in the presence of a qualified witness.<sup>28</sup> The receipt by the bank of the signed documents later that afternoon, within one to one-and-a-half hours of Mr Parker giving the documents to Mr Perrin indicated that there was insufficient time for Mrs Perrin to obtain legal advice and then sign the guarantee and mortgage in the presence of a qualified witness.<sup>29</sup> Also the lawyers for Mrs Perrin argued that the documents received by the bank did not include a letter from Mrs Perrin confirming that she had sought independent legal or financial advice and fully understood her liability under the guarantee.<sup>30</sup> Lawyers for Mrs Perrin also argued that the bank (by Mr Parker) knew that Fraser Perrin, who purportedly witnessed the signature of Mrs Perrin on the mortgage and guarantee was the brother of Mr Perrin and as such was not in a position to give independent legal advice. Further, the bank did not contact Fraser Perrin to confirm that he had indeed witnessed Mrs Perrin's signature on the documents.<sup>31</sup>

Taking these factors together, lawyers for Mrs Perrin argued that the bank should have been put on alert for the possibility that the signature of Mrs Perrin on the documents, including the Instrument of Mortgage had been forged and that the bank should have, as a prudent lender would, made further checks to satisfy itself that the person who signed the mortgage was indeed Mrs Perrin by either confirming by direct inquiry with Mrs Perrin or Fraser Perrin.<sup>32</sup> Similar arguments were made with respect to the second mortgage.<sup>33</sup> As such it was said that the

certificate of title would increase the incidence of fraud (see for example, Hewitt, "A Tangled Web: Land Registration and the Facilitation of Fraud—the England and Wales Perspective", forthcoming in, *Property and Sustainability*, (Thomson Reuters, 2011) and UK Land Registry, "Report on responses to e-conveyancing secondary legislation Part 3" [http://www.landregistry.gov.uk/upload/documents/econveyancing\\_cons.pdf](http://www.landregistry.gov.uk/upload/documents/econveyancing_cons.pdf) [Accessed March 9, 2012]). In New South Wales, Clayton Utz was recently commissioned by the NSW Land Registry to identify and evaluate possible solutions to provide the necessary functionality and risk management currently provided by the paper certificate of title (Clayton Utz, "NSW Land Registry: certificate of title solution for concurrent electronic and paper based conveyancing", September 22, 2011. It remains to be seen what the solution will be for Australia.

<sup>26</sup> See ss.11A, 185A of the Land Title Act 1994 (Qld).

<sup>27</sup> The bank had elected not to pursue its reasonable steps case and instead, conceded that it was not entitled to rely on the indefeasibility from the registration of the mortgages because it had failed to take reasonable steps to ensure that it was Mrs Perrin who executed them as required by s.11A. *Perrin* [2011] QSC 274 at [5].

<sup>28</sup> Further and better particulars of the reply and answer filed on behalf of the defendant, March 15, 2011, p.3 [18].

<sup>29</sup> Further and better particulars of the reply and answer filed on behalf of the defendant, March 15, 2011, p.4, [20].

<sup>30</sup> Further and better particulars of the reply and answer filed on behalf of the defendant, March 15, 2011, p.4, [20].

<sup>31</sup> Further and better particulars of the reply and answer filed on behalf of the defendant, March 15, 2011, p.5, [21], [22] and [23].

<sup>32</sup> Further and better particulars of the reply and answer filed on behalf of the defendant, March 15, 2011, p.6, [25].

<sup>33</sup> Further and better particulars of the reply and answer filed on behalf of the defendant, March 15, 2011, pp.9–11.

Commonwealth Bank failed to comply with s.11A(2) of the Land Title Act 1994 in that the Bank had failed to take reasonable steps to ensure that the person who executed the mortgages was identical with Mrs Perrin who was the registered proprietor of the property.<sup>34</sup> By virtue of s.185A, this failure meant the bank did not obtain the benefit of indefeasibility with respect to the mortgages.<sup>35</sup>

### The arguments made by the Commonwealth Bank

By contrast to what was submitted on behalf of Mrs Perrin, lawyers for the bank said that Mrs Perrin had opened a new bank account with the bank on August 1, 2000. In the course of opening this bank account, the bank had verified Mrs Perrin's identity by reference to Mrs Perrin's passport and her Queensland driver's licence. The bank also obtained her signature on a document called "New Account" and this was scanned into the bank's "CommSee" computer system on February 4, 2005 and could be accessed by other officers of the bank for the purpose of verifying the signature of Mrs Perrin on future occasions.<sup>36</sup> This verification of identity constituted 110 points of identification pursuant to the Financial Transaction Reports Regulations 1990 (Cth).<sup>37</sup> Further, the bank's lawyers argued that Mrs Perrin had been married to Mr Perrin since September 8, 1996<sup>38</sup> and that prior to end August 2008, Mr Perrin was considered a reputable businessperson and had been admitted as a solicitor in Queensland.<sup>39</sup> Prior to his bankruptcy, Mr Perrin held accounts with the bank since February 2000 and had been a client of the "Private Bank" section of the bank that services individual customers with an income exceeding AU \$250,000 per annum and assets that exceed AU \$2.5 million excluding their home.<sup>40</sup> The bank argued that its officers had verified the signatures on the security documents (instruments of mortgage for the first mortgage) by comparing the signatures on the security documents to the signature on documents held by the bank, such as the signature of Mrs Perrin on the "New Account" document.<sup>41</sup> A similar argument was made for the second mortgage.<sup>42</sup> The bank claimed that the signature on the security documents bore a close resemblance to that of Mrs Perrin's on the New Account form and that it was not possible to detect that it was a forgery without detailed forensic examination.<sup>43</sup> At no time before the end of August 2008 had any issue or allegation of fraud or misconduct arisen or

<sup>34</sup> Fifth amended defence and counterclaim filed on behalf of the defendant on April 19, 2011, [15] and [20].

<sup>35</sup> For non-Torrens readers, indefeasibility means that once an interest in land is registered, that interest is subject only to such estates and interests that are recorded against the title. Things known about the title, but which are not on the title, would not normally bind the person registering.

<sup>36</sup> Second further amended further and better particulars of the amended reply and answer filed on behalf of the plaintiff and first defendant by counterclaim, December 8, 2010, pp.2–3, [3].

<sup>37</sup> Second further amended further and better particulars of the amended reply and answer filed on behalf of the plaintiff and first defendant by counterclaim, December 8, 2010, p.3, [4].

<sup>38</sup> Second further amended further and better particulars of the amended reply and answer filed on behalf of the plaintiff and first defendant by counterclaim, December 8, 2010, p.3, [5].

<sup>39</sup> Second further amended further and better particulars of the amended reply and answer filed on behalf of the plaintiff and first defendant by counterclaim, December 8, 2010, p.3, [6].

<sup>40</sup> Second further amended further and better particulars of the amended reply and answer filed on behalf of the plaintiff and first defendant by counterclaim, December 8, 2010, p.4, [8].

<sup>41</sup> Second further amended further and better particulars of the amended reply and answer filed on behalf of the plaintiff and first defendant by counterclaim, December 8, 2010, pp.9–10, [22].

<sup>42</sup> Second further amended further and better particulars of the amended reply and answer filed on behalf of the plaintiff and first defendant by counterclaim, December 8, 2010, p.14, [31].

<sup>43</sup> Second further amended further and better particulars of the amended reply and answer filed on behalf of the plaintiff and first defendant by counterclaim, December 8, 2010, p.16, [31B].

come to the attention of the bank in respect of the operation of any of the accounts held with the bank by Mr Perrin or Mrs Perrin.<sup>44</sup> By May 2005, the bank had developed relationships with both Mrs Perrin and Mr Perrin and them together as a couple, which were distinguishable from the situation in which a mortgagee had no relationship or history with a mortgagor and third party borrower.<sup>45</sup>

Thus the pleadings were to the effect that the steps it had taken in verifying the signature on the instruments of mortgage for the first and second mortgage, given the surrounding circumstances, constituted reasonable steps as required by s.11A.<sup>46</sup>

*Tale 2: Western Australia—the Mildenhall fraud—the overseas registered owner having their land sold by a sophisticated criminal network (atypical, but possibly on the rise)*

In contrast to the Perrin fraud, the fraud that occurred in Western Australia in 2010 is not one that commonly occurs in common law jurisdictions.<sup>47</sup> It was not one perpetrated by a family member, but by professional fraudsters pretending to be the registered proprietor.

## Facts

Mr Mildenhall was the registered owner of two unencumbered properties in Western Australia. Mr Mildenhall's investment property in Karrinyup was sold in June 2010 for AU \$485,000 without his knowledge. He was living in Cape Town, South Africa at that time. He found out about the fraud when his neighbour rang him and told him that it had been sold. He then returned to Perth, only to find that the second property he owned in Wembley Downs was also about to be sold. A contract of sale for the second property had been executed but settlement had not taken place. A bank based in China received the proceeds of sale on the Karrinyup property.<sup>48</sup>

## Modus operandi

According to the officer-in-charge of the Major Fraud Squad investigating the fraud, the fraudsters were from Nigeria with possible collaborators in South Africa.

<sup>44</sup> Second further amended further and better particulars of the amended reply and answer filed on behalf of the plaintiff and first defendant by counterclaim, December 8, 2010, p.16, [31D].

<sup>45</sup> Second further amended further and better particulars of the amended reply and answer filed on behalf of the plaintiff and first defendant by counterclaim, December 8, 2010, [31E].

<sup>46</sup> Second further amended further and better particulars of the amended reply and answer filed on behalf of the plaintiff and first defendant by counterclaim, December 8, 2010, p.17, [33] and p.18, [34].

<sup>47</sup> See the comment by Detective Senior Sergeant Pete Davies that "such cases are uncommon": ABC News, "Allegations another house sold without owner knowing", <http://www.abc.net.au/news/2011-08-10/house-sold-from-under-owner/2833664> [Accessed November 21, 2011]. Also see Rouhshi Low, "Opportunities for fraud in the national electronic conveyancing system: fact or fiction?" (2006) 13 *Murdoch University Electronic Journal of Law* 225, 227 showing that the more common types of fraud are the ones perpetrated by those known to the victim of the fraud, such as family members and the more uncommon type of frauds are the ones perpetrated by those unknown to the victim of the fraud such as in the Mildenhall fraud.

<sup>48</sup> Various sources were used to piece together the details of the fraud—see: WA News, "House sold from under owner in property scam", <http://www.watoday.com.au/wa-news/house-sold-from-under-owner-in-property-scam-20100911-155qq.html> [Accessed November 21, 2011]; WA News, "Property scam highlights need for greater security" <http://www.watoday.com.au/wa-news/property-scam-highlights-need-for-greater-security-reiwa-20100913-15952.html> [Accessed November 21, 2011]; Eileen Webb, "Scammers target WA real estate transactions" (2010) *Australian Property Law Bulletin* 186; ABC News, "House scam victim can seek compensation" <http://www.abc.net.au/news/2010-09-21/house-scam-victim-can-seek-compensation/2269164> [Accessed November 21, 2011] and Settlement Agents Supervisory Board, "Urgent scam warning" eBulletin issue 25, September 10, 2010.

The fraudsters intercepted Mr Mildenhall's mail in South Africa. With the intercepted mail, the fraudsters were then able to obtain information about the properties and falsified a number of documents.<sup>49</sup> They instructed the agency to list the properties for sale, claiming that the sale was required because of financial hardship. The agency said they had dealt with Mr Mildenhall before using the same email account. The agency acted on the email and contacted the purported vendor on the telephone number provided in the email where it was found that the person was well informed of the details of the property to be put on the market. The agent listed the properties, selling the Karrinyup property in June 2010.<sup>50</sup>

Mr Mildenhall's signatures on the listing form as well as his signature on the contract of sale and the ensuing transfer documents were forged.<sup>51</sup> Verification of identity was purportedly performed by a Notary Public in Nigeria.<sup>52</sup>

### What enabled the fraud?

Mr Mildenhall had dealt with the real estate agent and the settlement agent before, and his signature was on the relevant files, but no comparisons between the signature on file and the one for the contract of sale was made.<sup>53</sup> There was also a change of all the vendor's contact details before the listing but this did not alert the real estate agent to possible fraudulent conduct. The emails authorising the sale were sent from Nigeria and on most occasions the email showed poor English but this too did not alert the real estate agent to the fraud.<sup>54</sup> Neither the real estate agent nor the settlement agent attempted to contact Mr Mildenhall to confirm the transaction, instead relying on the emails sent by the fraudsters.

Both Landgate and real estate agents claimed that this was a sophisticated fraud but Mr Mildenhall did not accept that assessment. He said when he saw the documents, his signature was obviously forged and very different to his real signature that the real estate agent and settlement agent had on file.<sup>55</sup>

### A new fraud trend?

When the news broke on Mr Mildenhall's plight, another fraud similar to that of Mr Mildenhall was revealed. This earlier swindle occurred in 2008. Dr Peter D'Allessandro said he was 10 days from settlement on a west Perth apartment when the legitimate owner, who had been living in South Africa, found out about the sale and brought the process to a halt. The property had been on the market without the legitimate owner's knowledge and was to be sold for AU \$775,000.

<sup>49</sup> Webb, "Scammers target WA real estate transactions" (2010) *Australian Property Law Bulletin* 186, 186.

<sup>50</sup> Settlement Agents Supervisory Board, "Urgent scam warning" eBulletin issue 25, September 10, 2010.

<sup>51</sup> Webb, "Scammers target WA real estate transactions" (2010) *Australian Property Law Bulletin* 186, 187. It is not exactly clear as to whether a false certificate of title was created based on false documentation, or whether the scammers were able to access the certificate of title. The latter is more unlikely. It is also possible that this property was one where a paper-based certificate of title was required to be produced to the land registry office. See: WA News, "Property scam highlights need for greater security" <http://www.watoday.com.au/wa-news/property-scam-highlights-need-for-greater-security-reiwa-20100913-15952.html> [Accessed November 21, 2011].

<sup>52</sup> Webb, "Scammers target WA real estate transactions" (2010) *Australian Property Law Bulletin* 186, 187.

<sup>53</sup> Webb, "Scammers target WA real estate transactions" (2010) *Australian Property Law Bulletin* 186, 186.

<sup>54</sup> Webb, "Scammers target WA real estate transactions" (2010) *Australian Property Law Bulletin* 186, 187.

<sup>55</sup> See ABC News, "Allegations another house sold without owner knowing", <http://www.abc.net.au/news/2011-08-10/house-sold-from-under-owner/2833664> [Accessed November 21, 2011].

Dr D'Allessandro said the email address used for correspondence with the agent was traced to Nigeria. Police investigated the fraud in 2008 but it was not resolved.<sup>56</sup>

More recently, Western Australia police authorities have been reported as investigating allegations that another house has been sold in Perth without the knowledge of the owner. Police say they have been told that a home in the suburb of Ballajura, worth around \$400,000, was recently sold by Nigerian scammers.<sup>57</sup> The authors spoke to a spokesperson from Consumer Protection in WA who confirmed that this fraud in 2011 was very similar in nature to what happened to Mr. Mildenhall in 2010. In both cases, the owners were overseas and in both cases the sale proceeded without any face-to-face interaction between the 'owners' and the estate and settlement agents.

This scam was then followed by another one, this time in Sydney. Similar to the Perth scams, the Sydney scam involved property that was under management by a real estate agency, with the owner living in South Africa. The real estate agency thought the request to sell was legitimate and solicitors in Double Bay drew up contracts. The unit was due to go to auction in September. The fraud was uncovered when the real estate who originally sold the owner the property happened to see an advertisement for the auction on the Internet and emailed his former client. This allowed the owner to stop the sale.<sup>58</sup>

In the next section, we examine how these frauds would have played out in a number of jurisdictions. Is there any jurisdiction that would have prevented the frauds occurring?

### **Part 3: Applying current legislative and practice oriented guidelines to the two tales**

#### *The UK requirements—Perrin scenario*

Under the UK requirements, the conveyancer has the onus of identity verification.<sup>59</sup> It is this person when acting for Mrs Perrin who would have needed to confirm her identity as she would be lodging an application to register a mortgage and would need to complete the relevant details on the application. However the UK requirements do not specify how identity is to be confirmed. As such, reliance is placed on the conveyancer having complied with their professional duties in verifying the client's identity. It is only if the conveyancer is unable to confirm identity that evidence of identity must be provided in the requisite form. These forms require inspection of identity documents as well as certification on a passport size photograph of the person whose identity is being verified.<sup>60</sup> Of course, the fraudulent person could forge certification and signatures so it would appear as if evidence of identity has been inspected. However if the conveyancer/solicitor complies with her/his professional duties and heeds the guidelines provided by

<sup>56</sup> The West Australia, "Another real estate scam case emerges" <http://au.news.yahoo.com/thewest/a/-/wa/7945937/another-real-estate-scam-case-emerges/> [Accessed November 21, 2011].

<sup>57</sup> ABC News, "Allegations another house sold without owner knowing", <http://www.abc.net.au/news/2011-08-10/house-sold-from-under-owner/2833664> [Accessed November 21, 2011].

<sup>58</sup> See ABC AM, "Calls for strict ID checks for property sales", <http://www.abc.net.au/am/content/2011/s3370958.htm> [Accessed November 21, 2011].

<sup>59</sup> See generally Land Registration Rules 2003, Land Registry, Practice Guide 67, Evidence of Identity.

<sup>60</sup> Land Registry Practice Guide 67, Evidence of Identity, 3.



the Law Society,<sup>61</sup> such as those that warn solicitors that non face to face transactions increases the risk of fraud, and given that conveyancers could be liable for fraud for dishonestly providing information or making a statement that the conveyancer knows is untrue, then arguably the conveyancer would not lodge the application without having verified the identity of Mrs Perrin.<sup>62</sup> Therefore, whilst the authors conclude that the opportunity to eliminate the Perrin fraud was possible, much would depend on the practices and arrangements of the particular conveyancer. Would that person, if having dealt with Mr Perrin on a regular basis in the past have reason to think that something untoward was occurring in this particular instance. As there was no mandated identity verification or checking, the fraud was still possible in the United Kingdom.

### *The Ontario provisions—Perrin scenario*

The Ontario provisions differ markedly from all other jurisdictions in that they link the right to receive compensation for fraud from having undertaken due diligence within the transaction.<sup>63</sup> Whereas Mrs Perrin would have been able to utilise the provisions in the legislation that provide that registration of a void instrument leaves the underlying instrument void, a provision not in existence in Australian Torrens jurisdictions,<sup>64</sup> the bank would then have had to apply to the fund for compensation having shown a requisite level of due diligence. In essence, can the bank demonstrate that<sup>65</sup>:

- it had verified the identity of the person mortgaging the property and;
- it had verified that the registered owner was in fact mortgaging the property.

Whilst the bank had not conducted an in person meeting with Mrs Perrin it would presumably argue that it had obtained, on previous occasions, the relevant identity documents from Mrs Perrin, which Mrs Perrin was a known customer to the bank, and as such, the bank had verified the identity of the person mortgaging the property.

Did the bank verify that Mrs Perrin was in fact mortgaging the property? The bank had simply received instructions from Mr Perrin but did not confirm these instructions with Mrs Perrin. Arguably, the bank had not taken reasonable steps to verify that Mrs Perrin was in fact mortgaging the property. The bank will argue that it had, given that Mr and Mrs Perrin were both known customers of the bank and that Mr Perrin usually handled the financial matters with the bank.

The Ontario due diligence requirements are drafted in a similar manner to Queensland, that is, the steps specified are non-exhaustive and face to face verification is not mandatory. As such it is likely to be deficient in preventing the fraud that occurred here.

<sup>61</sup> UK Law Society, *Property and Registration Fraud*, October 11, 2010.

<sup>62</sup> The UK Law Society guide cross-references to the UK Money Laundering Regulations 2007.

<sup>63</sup> Sections 57(4)(b) and 57(4.1)(b) of the Land Titles Act 1990 (Ontario).

<sup>64</sup> Section 155 Land Titles Act 1990 (Ontario).

<sup>65</sup> See: *Order of the Director of Titles*, available at [http://www.ontario.ca/ontprodconsume/groups/content/@onca/@bundles/@landreg/documents/document/ont06\\_023539.pdf](http://www.ontario.ca/ontprodconsume/groups/content/@onca/@bundles/@landreg/documents/document/ont06_023539.pdf) [Accessed September 4, 2012].

*Queensland—Perrin scenario*

As can be recalled,<sup>66</sup> failure by a mortgagee to undertake reasonable steps to verify identity will result in a loss of the benefits of title by registration. What is clear and evident from the banks' preliminary arguments is that the very amorphous nature of the non prescriptive Queensland manual<sup>67</sup> as to what can constitute reasonable steps leaves it open for mortgagees such as the Commonwealth Bank in the Perrin case to argue that it had complied with its obligations to take reasonable steps to verify identity despite not having any direct contact with the registered proprietor. As can be seen in the Perrin case, a requirement for face-to-face contact would have prevented the fraud and the bank would not have been able to argue that it had met its obligations despite not having any direct contact with Mrs Perrin. For this reason, the authors suggest that the Qld requirements are deficient.

*New South Wales—Perrin scenario*

In New South Wales, mortgagees are similarly required to take reasonable steps to ensure that the person who has executed the mortgage is in fact the person whom they are representing.<sup>68</sup> A failure to do this could lead to the Registrar-General refusing to register the mortgage. Compliance with Commonwealth Anti-Money Laundering and Counter-Terrorism Financing Rules meets the standard required by the regulations.<sup>69</sup> The Bank would suggest that it had appropriate risk based systems in place and was satisfied given the background and banking relationship that they had with the Perrins, which the customer was indeed the person that he/she claims to be. Thus similar to Queensland, the authors suggest that the NSW provisions also not necessarily have provided a mechanism to break the inexorable links that are needed for this type of fraud to occur.

*Victoria, South Australia, Western Australia, Tasmania—Perrin scenario*

None of these jurisdictions would have required the mortgagee to verify identity, though there is a broad provision in Victoria that allows the Registrar to refuse to register if that person is not satisfied as to the identity of a person by or on behalf of whom the instrument was executed.<sup>70</sup> However, without the need for identity verification, the Perrin fraud could have occurred in these jurisdictions.

*New Zealand—Perrin scenario*

In New Zealand an electronic instrument cannot be accepted for registration unless it is certified in accordance with the certification requirements found in ss.164A to 164E of the Land Transfer Act (NZ) 1952. Amongst the certifications is one

<sup>66</sup> Lynden Griggs and Rouhshi Low, "Identity fraud and land registration systems: an Australian perspective", [2011] 75 Conv. 285, 302.

<sup>67</sup> See *Queensland Land Title Practice Manual* [2-2005]. See also s.11A(2) of the Land Title Act 1994 (Qld).

<sup>68</sup> Section 56C of the Real Property Act 1900 (NSW); Real Property Amendment Regulations 2011 (NSW), now incorporated in the Real Property Amendment Regulations 2008.

<sup>69</sup> Clause 11A of the Real Property Amendment Regulations 2008.

<sup>70</sup> Section 27AB of the Transfer of Land Act 1958 (Vic).

that requires the conveyancing practitioner to confirm that he/she has taken reasonable steps to confirm the identity of the person on whose behalf the certifying practitioner is acting. To assist conveyancing practitioners with compliance, Land Information New Zealand (LINZ) published a standard (hereafter LINZ standard) setting out the minimum requirements for verifying identity.<sup>71</sup> Applying the LINZ standard the Perrin transaction would be classed as a routine, rather than a high-risk transaction.<sup>72</sup> This means that identity can be verified via an original government-issued photographic ID and a document showing the landowner's name and the physical address of the property.<sup>73</sup> However, because Mrs Perrin is known to the bank, the second requirement may be dispensed with, but an original government issued photographic ID is still required.<sup>74</sup> The need to produce the photographic ID, regardless of whether the client is known to the mortgagee may have prevented the Perrin fraud. It would have meant that the bank officer would have had to ask Mrs Perrin to produce photographic ID. She would have then been alerted to the fact that her husband was attempting to mortgage the property. Requiring practitioners to examine photographic identity despite knowing the landowner personally has a similar effect to requiring face-to-face verification of identity which, as postulated by the authors, is critical in preventing identity fraud.<sup>75</sup> It is however possible for the practitioner to disregard the requirement for production of a photographic ID.<sup>76</sup> Should this occur—should the practitioner not have requested Mrs Perrin to produce photographic ID but instead used an ID previously obtained that was kept on file, and the mortgage was registered, the bank would obtain an indefeasible title. Unlike Queensland, the New Zealand provisions at present do not link the requirement for identity verification with loss of indefeasibility.<sup>77</sup>

### *Summary and application of recommended framework to the Perrin fraud*

None of the jurisdictions would indubitably prevent the Perrin fraud. The critical factor would have been a requirement for face-to-face verification of identity and as seen from the examination above, none of the requirements had this necessarily mandated. It is for this reason that the authors recommend that any identity verification framework should have as its starting point a requirement for face-to-face contact or if this is not physically possible, delegation to trusted

<sup>71</sup> Land Information New Zealand, "Verification of identity for registration under the Land Transfer Act 1952", LINZS0002.

<sup>72</sup> LINZS0002, [4].

<sup>73</sup> LINZS0002, [4].

<sup>74</sup> LINZS0002, [4].

<sup>75</sup> According to Mr Muir, Registrar-General of Land, Land Information New Zealand, the New Zealand requirements "involve face to face identity verification (either directly or via a trusted delegate) on each occasion that a lawyer obtains client authority for a land transaction. The form used to document client authority requires the person verifying identity to certify that they have witnessed the client sign the form and sighted the relevant photo ID": Email to the author on November 14, 2011.

<sup>76</sup> In a recent case for example, the NZ Lawyers Standards Committee found a Rotorua lawyer guilty of unsatisfactory conduct. The lawyer had falsely witnessed an Authority and Instruction form for a LINZ transaction—the lawyer had verified a photo ID when he had not met the client: New Zealand Law Society, "Quality Control of E-dealing", *LawTalk* 4, November 2011, 5.

<sup>77</sup> It has been proposed in New Zealand that a direct obligation should be imposed on mortgagees, similar to what has happened in Queensland. See: New Zealand Law Commission, *Report 116 A New Land Transfer Act*, June 2010, [2.20].

entities. Mrs Perrin was in the state, contactable. The means to verify identity through face-to-face contact was available to the Bank. Compliance by the bank of this requirement alone would have prevented the fraud.

## **Now the atypical fraud**

### *The UK requirements—Mildenhall scenario*

Under the UK requirements, the fraudsters would contact a conveyancer to act on their behalf. The conveyancer would fill in relevant form as the application involves a transfer and complete the appropriate information for confirmation of identity. Because the transferor, Mr Mildenhall, is not represented (the fraudsters are impersonating the transferor), evidence of identity would need to be supplied. The conveyancer receives from the fraudsters the form that appears to have been completed with the section dealing with evidence of identity having been inspected and certified. The question in the United Kingdom, is whether the conveyancer, having received these documents would necessarily go further. If the documents appear genuine, then the answer may well be no. In the Mildenhall scenario the fraudsters were able to dupe real estate agents, settlement agents, and the land registry office. There is no reason to believe that a conveyancer could not similarly have been misled.

### *The Ontario provisions—Mildenhall scenario*

Similar to Mrs Perrin, Mr Mildenhall will be able to rely on the legislation to have the transfer removed. The bona fide purchaser will then be able to apply to the assurance for compensation and to succeed here, will need to demonstrate the required due diligence. The purchaser must demonstrate that they took reasonable steps to verify that the registered owner was in fact selling the property. Assuming the purchaser had a solicitor/conveyancer acting on his behalf and the conveyancer had access to the emails that the fraudsters were sending to the real estate agent instructing the real estate agent to sell the property, then given the poor English, change of details, and other warning signs, due diligence would arguably have not been met. The lack of certainty in whether the bona fide purchaser would or would not succeed in her/his argument that due diligence was met demonstrates the deficiency in the Ontario requirements and the importance of requiring face to face or delegated to a trusted individual with independent confirmation.

### *The Queensland/New South Wales provisions—Mildenhall scenario*

As discussed, neither the Queensland nor New South Wales provisions could have been invoked as the fraud did not involve a mortgagee. This starkly highlights that identity verification cannot solely be placed on the mortgagee.

*Victoria, South Australia, Western Australia, Tasmania—Mildenhall scenario*

There are no provisions that would have assisted in preventing this, though Western Australia would now require that witnessing of the relevant documents be before an Australian consular official. This official would need to verify identity by the provision of certified documents, with the original documents that were sighted by the consular officer to be lodged in the registry office in Western Australia.<sup>78</sup> South Australia has also emphasised to registering parties the importance of verification of identity.<sup>79</sup>

*The New Zealand provisions—Mildenhall scenario*

For New Zealand, assuming the owner was not known to the settlement agent, and the owner is transferring unencumbered land, then the transaction would be classed as a high-risk transaction.<sup>80</sup> In the case of high-risk transactions, further steps are required. These include independently obtaining contact details for the physical address of the property and contacting the landowner using those details, or other independent corroboration.<sup>81</sup> These further steps are in addition to the documents required for verifying identity in routine transactions. This additional requirement would most likely have uncovered the fraud because it would have meant the settlement agent independently obtaining contact details of the registered proprietor and contacting the registered proprietor using those contact details, as opposed to relying on the contact details given in the email by the scammers.

The guidance material in the New Zealand standard also provides assistance for situations where it is not possible for the practitioner to verify the identity of an interested party (for example where the interested party lives in another location or is overseas). In these circumstances, the practitioner may have the verification carried out by a delegate.<sup>82</sup> However, applying this to the Mildenhall scenario may not have prevented the fraud. As indicated above, the documents were witnessed by a notary public and the New Zealand guidelines<sup>83</sup> would have allowed the witnessing that actually occurred to have met the compliance requirements of New Zealand. It is for this reason that the authors suggest that whilst delegation should be allowed where face-to-face verification is not possible, independent confirmation or corroboration is still necessary and should be required, whether or not the registered proprietor is known to the mortgagor.

*Summary and application of the recommended framework to the Mildenhall scenario*

Again, none of the current jurisdictional requirements would have necessarily prevented the Western Australia fraud. The authors argue that the more independent

<sup>78</sup> The requirement of a transferor to travel some distance to a consular office will alleviate the obligations. Landgate, *Bulletin No.201*, October 3, 2011, p.3.

<sup>79</sup> Government of South Australia, *Mortgage frauds involving counterfeit certificates of title*, No.156, February 24, 2009.

<sup>80</sup> LINZS0002, [5.1].

<sup>81</sup> LINZS0002, [5.2].

<sup>82</sup> LINZS0002, [5.2], p.13.

<sup>83</sup> LINZS0002, [5.2].

corroboration of instructions, the less likely the fraud. This is particularly the case for transactions where face-to-face verification is not physically possible due to the owners living, for example, overseas. Advances in technology have equipped fraudsters with the ability to produce high quality forgeries, identity documents are not precluded from this.<sup>84</sup> In a non face-to-face transaction, fraudsters have the opportunity to forge identity documents, signatures and a multitude of other documents to impersonate the registered proprietor. Therefore independent corroboration of instructions and identity verification is a necessity in these types of cases.

#### **Part 4: What have we learnt—recommendations for core principles of identity verification**

The lessons are quite simple. If the Commonwealth Bank in the case of *Perrin* had simply contacted her to verify her instructions to mortgage the property, the saga of spousal deceit and the expensive litigation that inevitably followed would not have occurred. Thus the author's first recommendation is that identity verification requirements should have at its core a requirement for face-to-face identity verification. The history of dealings and past relationships between customers should not, under any circumstances obviate the need to have independent and face-to-face verification of what is occurring. Where face-to-face verification is not physically possible, as in the case of the Mildenhall fraud, simple measures to counteract this inability are available, as highlighted by recent changes to witnessing requirements. The important point here is the delegation of face-to-face verification of identity to a trusted third party where the relevant conveyancing stakeholder can then independently verify with the trusted third party that identity verification had been performed.

The Mildenhall fraud also shows that not all frauds involve a mortgagee. In these types of frauds, identity verification requirements that place the burden of identity verification solely on the mortgagee would not have prevented these frauds from occurring. Thus the authors' second recommendation is for all stakeholders involved in the conveyancing process to play an active role in identity verification. Had the solicitors involved in the conveyancing process and purportedly acting on behalf of Mr Mildenhall verified instructions with him, both in writing and verbally, particularly as there were some aspects of the transaction that looked suspicious (changing of contact details, poor English in the emails) then likely the fraud would have been prevented. In the authors' view, fraud prevention would be more effective with the collaborative efforts of all stakeholders involved in the conveyancing transaction.

The authors' final recommendation is for the linking of identity verification obligations with the benefits of registered title because then the law appositely

<sup>84</sup> For example, in 2003, an identity fraud syndicate was uncovered by the multi agency Identity Crime Task Force. Investigations revealed a vast amount of allegedly false identity documents as well as equipment capable of manufacturing such documentation: Australian Federal Police, "Identity fraud syndicate arrested", <http://www.afp.gov.au/media-centre/news/afp/2003/November/identity-fraud-syndicate-arrested.aspx> [Accessed November 21, 2011]. Recently, officers of the Australian Federal Police executed a search warrant at a residential address in the eastern Melbourne suburb of Mitcham on November 17, 2011 and seized 10,000 fake credit cards and a large amount of related sophisticated manufacturing equipment: Australian Federal Police, "Identity crime raids seize 10,000 fake credit cards" <http://www.afp.gov.au/media-centre/news/afp/2011/november/identity-crime-raids-seize-10000-fake-credit-three-arrested.aspx> [Accessed November 21, 2011].

provides a carrot and a stick to ensure that the parties to whom the title should reside is correctly placed. If one is to receive the advantages of the registered title system, the corresponding obligations to share the burden should be imposed.

## **Conclusion**

Complete elimination of fraud may never be possible. But in many instances, these frauds are preventable, usually by taking simple measures such face-to-face contact with the owner of the land. For Mr Mildenhall the consequences were disastrous and whilst Mrs Perrin succeeded the stress associated with litigation of this nature is something to which she should not have had to bear. In these instances the law cannot be seen to be meeting the expectations of the community. In the case of Mr Mildenhall, the result (despite whatever compensation he receives) appears perverse. Those jurisdictions that have increased obligations on stakeholders deserve credit. Nevertheless, at present it is not enough. Face-to-face verification by mortgagees and increased vigilance by other stakeholders involved in the conveyancing transaction represents the best opportunity to minimise the potential for nefarious conduct.



# Going through the obstruction, the Torrens System Assurance Fund and contemporary solutions — a tale weaved from a story of a nun, a romantic triangle and sibling corruption

Rouhshi Low and Lynden Griggs\*

*Private title insurance has been the subject of much debate by law reform bodies and academics. This article adds a new dimension to the discussion by analysing its role against a recent scenario where a nun was betrayed by the actions of her brother, and compensation payable from the assurance fund, after much challenge by the registrar, amounted to in excess of \$4 million. We ask whether the slow burning of title insurance into the psyche of Australian home purchasers will see state-based assurance fundings looking to minimise their role in the Torrens system. We also query how the rather more immediate electronic establishment of electronic conveyancing will alter the balance between the assurance fund, private title insurance and the increasing responsibilities on stakeholders involved in conveyancing.*

## Introduction

The title guarantee that exists in the modern land registration system is a remarkable one. Nothing quite like it exists for other types of property, and in a majority of countries in the world buyers of land are not so well protected.<sup>1</sup>

In 1859, 1 year after the introduction of the legislation<sup>2</sup> establishing the land registration system that was to bear his name, Sir Robert Torrens wrote, in respect of the establishment of the assurance fund, that its introduction was to 'go through the obstruction':

[The assurance fund] proceeds upon the principle of transferring the liability to claim by a rightful owner from the land itself to the person of the individual to whom certificate of title may be granted in error, the personal security being supplemented by an assurance fund with government guarantee. This message method may be described as 'going through the obstruction'.<sup>3</sup>

The words of 1859 resonate no less strongly today than they did then. The NSW Supreme Court recently recognising that:

Recognising loss or damage and paying compensation became normal parts of the workings of the Torrens system, and are not enormities requiring intervention of the

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1 Scottish Law Commission, *Report on Land Registration*, Scot Law Comm, No 222, pp 207–8.

2 Real Property Act 1858 (SA) (original emphasis).

3 R R Torrens, *The South Australian System of Conveyancing by Registration of Title*, Adelaide, 1859, p 23.



law of tort. The Torrens System pursues efficiency and promptitude in establishing land titles, and deals with the risks which pursuit of these advantages brings with it.<sup>4</sup>

Today we can only speculate as to what obstacles Robert Torrens was referencing. Undoubtedly opposition by the legal profession was fierce, with the conservative mantra of this profession adhering strictly to the *principle of nemo dat quod non habet*,<sup>5</sup> — any movement away from this seen as a cross too strong to bear.<sup>6</sup> Despite the commonly accepted view that this was the primary driver for the establishment of the assurance fund, perhaps the reasons for its introduction by the one-time Collector of Customs, elected to parliament on a mandate of land law reform,<sup>7</sup> were more prosaic and somewhat less responsive to the political opposition of the day. As Whalan notes the original Bill did not have an assurance fund, but its inclusion at the last minute was probably more to do with the receipt by Torrens of the 1857 report by the English Royal Commissioners into *Registration of Title with Reference to the Sale and Transfer of Land*, than of placating the views of solicitors. This report landing on his desk on the eve of the second reading speech to the South Australian Real Property Act — the English Commissioners identifying the need for some form of state indemnity.<sup>8</sup> But whatever may have been the reasons, for Australia at least, the establishment of an assurance fund made its mark as one of the pillars of title by registration, and serves practically, as a measure to compensate those the subject of wrongdoing. But will this continue? Our thesis is to question, not so much its viability, but as the culture and style of conveyancing changes in a modern e-environment, will governments seek to use other measures to appease those who might have otherwise have been wronged by the registration of another innocent party as owner. Will governments, as increasingly seems to be their want, absolve themselves from responsibility, instead promoting a view that compensation can be more efficiently delivered through market mechanisms. What lies behind these practical considerations is our view that the onus of liability and payment of compensation has subtly shifted from the state to the stakeholders in this era of e-conveyancing (specifically the subscribers such as conveyancing agents and mortgagees), through either legislative or regulatory means, and at an operational level, the rise of private title insurance will operate to deflect claims from an assurance fund that at times, can be costly and expensive to access, to an insurance system where competitive pressures will seek to deliver appropriate consumer outcomes.

Intriguingly, the circumstances that demand this re-examination are arguably no different from what they were in the 1850s. The wanton land fraud<sup>9</sup> of that time has become the mortgage epidemic of today.<sup>10</sup> While the

4 *Challenger Managed Investments Ltd v Direct Money Corp Pty Ltd* (2003) 59 NSWLR 452; 12 BPR 22,257; [2003] NSWSC 1072; BC200307738 at [84].

5 No one gives what he does not have.

6 F Selnes, 'Who Should Pay when Lawyers are Rogues? Queensland's Real Property Act Assurance Fund or the Legal Practitioners' Fidelity Fund' (1994) *APLJ Lexis* 2 at 3.

7 L A McCrimmon, 'Compensation Provisions in Torrens Statutes: the existing structures and proposals for change' (1993) 67 *ALJ* 904 at 906.

8 *Report of the Commissioners appointed to consider the subject of Registration of Title with Reference to the Sale and Transfer of Land*, 1857, London, c 2215.

9 Torrens, above n 3, p 13.

modern causes of this are probably somewhat speculative, (the historical reasons for Torrens polemic against general land law are well known) though one can guess that the current capacity to assume another's identity, the de-personalised and intermediated nature of mortgage broking and intergenerational doubts as to the receipt of an inheritance may be somewhat to blame. But are the compensation provisions, (as was suggested by the then Minister for Information Technology, when introducing amendments to the NSW assurance scheme in 2000), 'so deeply ingrained . . . that without such a scheme there would be significant and detrimental repercussions in conveyancing costs and practices'.<sup>11</sup> Obviously we think not. Modern developments may well see states questioning the very existence of an assurance fund perhaps revealing that, as the Scottish Land Commission noted, the assurance fund may well have a psychological importance, but rarely contribute significantly at the practical interface.<sup>12</sup> Further, we know that other nation states have, rather than provide compensation as a foundation stone of land registration, increased the responsibility on those participating and profiting in the system of land transfer. For example, Germany has very little identified land fraud, with some suggesting the detailed and mandated procedures relating to attestation of transfer documents and the carrying of national identity cards (the *Personalausweis*) as somewhat of a prophylactic measure against land fraud.<sup>13</sup> While the claims of the 1850s that the Torrens System would not stand the test of time have been proven horribly wrong,<sup>14</sup> our thesis is that the current culture and direction of reform will see the barriers placed in different locations and the movement through the obstruction dealt with in a way that is more nuanced involving different measures and options. While we don't see these measures as going so far as to undermine the existence of the Torrens system, their presence and introduction will need to be carefully managed to avoid any public shock or community reaction to something that has served us well for 160 years. Can the modern developments achieve the same business efficiency and fairness, as has the present compensation system? As noted by the Canadian Joint Land Titles Committee:

If there were no compensation system, persons dealing with the land would be likely to take expensive and time consuming precautions to avoid losses which could, but are not likely to, occur under the system. The social cost of taking such precautions

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10 P Butt, 'Indefeasibility and Forged Mortgages: The Mortgage Fraud Epidemic spreads to Victoria' (2012) 86 *ALJ* 84.

11 Second Reading Speech, Parliamentary Debates, Legislative Assembly, 3 May 2000, p 5187.

12 Scottish Law Commission, *Discussion Paper on Land Registration: Void and Voidable Titles*, The Stationery Office, Edinburgh, 2004, at [1.21]; Noted, in R Wu and M Y B Z Kepli, 'Expedition of Torrens system in common law world and its Asian development in Singapore and Hong Kong' [2012] 2 *Prop Law Review* 99 at 105.

13 For a discussion around the German land system, see E P Polten, *German and Canadian Real Property Law: A Comparison*, 2011, at <<http://www.poltenassociates.com/Links/German-and-Canadian-Real-Property-Law-A-Comparison.pdf>> (accessed 16 May 2014). For a discussion of corruption levels, see *The International Fraud and Corruption Report — A study of selected countries*, NHS Counter Fraud and Security Management Service, July 2006.

14 Torrens, above n 3, p 13.

is not justifiable. It is better to accept that fact that there will be losses and to spread them over all users through a user-funded compensation system.<sup>15</sup>

Our argument is that undoubtedly there is a movement afoot in the direction and responsibility for compensation. While many of these developments are to be applauded (increasingly responsibility on mortgagees to verify identity), what is less known is the practical import of measures such as private title insurance on the psyche of buyers and sellers. If there is to be a wholesale change in culture that would see this becoming an accepted part of conveyancing, the state will naturally begin to examine its place as the provider of compensation. After all, it was only some 25 years ago that the very abolition of a compensation fund was considered by reform bodies in Australia.<sup>16</sup> While the view that was ultimately taken was to enhance the embedded assurance fund, rather than remove it altogether, it was noted that 'it would be quite strange, in this era of consumerism, to remove a long standing consumer protection measure unless it is replaced with a superior consumer protection measure; and it is the right time to introduce such a change'.<sup>17</sup> If that time has not quite arrived, we have no doubt that the footsteps approaching the door may well look to walk straight through any obstruction.

Our approach in examining this topic will be to consider the current context for the assurance fund in Australia, and then through a contemporary example, ask how the existence of title insurance, increased legislative obligations on mortgagees, or enhanced regulatory measures on conveyancing agents may have seen the fraud either being uncovered before reliance on compensation measures need occur, (the ideal outcome) or a more efficient receipt of compensation when the fraud occurred (a more efficient response to today's situation). The latter point particularly relevant in those jurisdictions such as Tasmania, Western Australia, South Australia and the Australian Capital Territory, where the fund is one of last resort,<sup>18</sup> and the claimant must first take action against the wrongdoer, (assuming that this is possible) before recourse can be had to the fund.

### **The current compensation provisions and how they operate**

The principles surrounding the current assurance fund provisions are relatively straightforward and can be simply stated. Compensation is payable when a person is deprived of land or an estate or interest in land.<sup>19</sup> The amount of compensation will be that which will put the claimant in a position that they

15 Joint Land Titles Committee, *Removing the Foundation: Proposals for a Model Recording and Registration Act for the Provinces and Territories of Canada*, July 1990, p 28.

16 New South Wales Commission, *Torrens Title: Compensation for Loss*, Report No 76, 1996.

17 Ibid, at [4.3].

18 P Carruthers and N Skead, '150 years on: The Torrens compensation provisions in the last resort jurisdictions' (2011) *APLJ Lexis* 4.

19 Land Titles Act 1925 (ACT) ss 143–151; Land Titles Act 1980 (Tas) ss 150–159; Land Title Act 2000 (NT) ss 192–196; Land Title Act 1994 (Qld) ss 188–190; Real Property Act 1886 (SA) ss 201–205; Real Property Act 1900 (NSW) ss 128–135; Transfer of Land Act 1958 (Vic) ss 108–111; Transfer of Land Act 1893 (WA) s 201.

would have been had the deprivation not occurred, though, this is not as clear cut as it would appear to be.<sup>20</sup> For example, if the value of the land has significantly increased between the date of deprivation and the date of judgment, authorities support the idea that the claimant should recover the increased value of the property rather than its value at the time of loss.<sup>21</sup> This propitious view supported somewhat by the broader policy rationale that access to the fund should be approached on the basis that it is to benefit those affected. For example, in *Solak v Registrar of Titles*<sup>22</sup> the court was of the mind that:

the registrar appears to have forgotten that he is administering a beneficial fund. The purpose of the fund is not to accumulate money but to provide compensation to persons who are deprived of an interest in land by the operation of the indefeasibility provisions. The Registrar's primary role is to ensure that persons who are entitled to compensation receive it. The responsibility to protect the fund from unmeritorious claims is not paramount.<sup>23</sup>

### **The current provisions in operation — *Pedulla v Panetta*<sup>24</sup>**

This case provides an archetypal example of how the compensation provisions operate in practice. However, what drew the authors to the use of this case as an exemplar of what could possibly be achieved were a different compensatory or regulatory regime were adopted was, at least from an academic viewpoint, the very significant though reasonable legal costs incurred in pursuing this matter on behalf of the claimant. Despite compensation in the sum of \$3.8 million, which in the opinion of the authors was clearly available to the plaintiff, legal costs, which she also recovered, totalled over \$329,000. If a more efficient system of recovering the compensation could be made or precursor checks imposed to prevent the fraud happening in the first place, the savings are obviously significant.

The property in question had at one point in time been jointly owned by the plaintiff (Teresa Nadia Pedulla) and a husband. When her husband died in 1986, Pedulla became the sole registered proprietor. In 2004 the plaintiff travelled to Calabria, Italy and began to reside with an order of nuns. At, and prior to this time, the plaintiff's brother was living in the property. In 2006, and with Pedulla living a life of religious exclusion, the brother of the plaintiff (Panetta) began a series of manoeuvres that ultimately saw the property transferred to him and his soon to be wife. It began with a question by Panetta to the ex-partner of the person who was to become his wife. The question he raised of this individual, a solicitor by profession, was: 'My sister is in Italy in a convent and she is supposed to transfer all of her assets to the Church. Is there any way we can transfer the property to me rather than giving it to the Church?' This solicitor communicated with another firm, indicating that he acted on behalf of the plaintiff and that he had the authority from the plaintiff

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<sup>20</sup> *Perpetual Trustees Victoria Ltd v Peter Van Den Heuvel (No 2)* (2009) 14 BPR 26,765.

<sup>21</sup> *Registrar-General v Behn* [1980] 1 NSWLR 589; (1980) NSW ConvR 55-002.

<sup>22</sup> (2011) 33 VR 40; [2011] VSCA 279; BC201107117.

<sup>23</sup> *Ibid*, at [88].

<sup>24</sup> (2011) 16 BPR 30,229.

to act in the transaction for the sale of the property to the brother. This was untrue. To support these manoeuvres, statutory declarations, a forged power of attorney and a forged authority were all produced. In 2007 the transfer was completed with the brother becoming the registered proprietor, consideration of \$1 noted on the various documents. Now with ownership of the property, the brother raised various mortgages against the property. In 2011, the brother and his partner finally sold the property to innocent purchasers for the sum of \$3.8 million, settlement occurring in late April 2011. By this time Pedulla had left the cloisters to care for her dying father, and she became aware, after disclosures by her brother, that she was no longer the owner of the property. In May of 2011, the brother and his partner left Australia on separate flights and have not been seen since. Net proceeds to each of them were in excess of \$684,000. On her return to Australia, Pedulla was penniless, distraught and without a home.<sup>25</sup>

Despite what would appear to be a clear example of a deprivation of an interest in land, the court was required to consider possible limitations on the plaintiff's entitlement. These limitations were as follows:

- 1) What was the market value of the land as regards compensation;
- 2) Was the conduct of the plaintiff in any way responsible for what happened; and,
- 3) Would the solicitor's professional indemnity insurer be liable for the conduct of the solicitor.

In the circumstances of this case, none of these grounds operated to reduce Pedulla's claim. The court quickly dismissed the Registrar's tentative and speculative submission<sup>26</sup> that the market value was something other than \$3.8 million. 'The outcome [ie, the payment by the purchasers] according to conventional market theory, the daily staple of economists, is the market value'.<sup>27</sup> Furthermore, the plaintiff had no reason to think that her brother and sister-in-law would take any steps in relation to the property that would see its sale. While some may have criticised her failure to caveat, given the small gap between when she became concerned about the behaviour of her brother and his conduct in relation to the property and settlement, her omissions were excusable and did not represent any failure by her to take care of her own interest.<sup>28</sup> The final ground of possible exclusion from the assurance fund was that LawCover, the solicitor's professional indemnity insurer, would be required to indemnify against the actions of the solicitor. This attracted more attention by Pembroke J. In coming to the conclusion that it was not an exclusionary ground, his Honour closely considered the conduct of the solicitor, noting that if his behaviour was dishonest or fraudulent, his professional indemnity policy would not operate to provide recourse should he be personally pursued by Pedulla. In examining all the facts, and most notably the solicitor's previous relationship with the wife of the brother, the procuring of the relevant documents by false statements and his implausible excuses in court all led to a view that it was unlikely that the loss was compensable under

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<sup>25</sup> Facts summarised from at [1]–[14] of the case: (2011) 16 BPR 30,229.

<sup>26</sup> *Ibid.*, at [20].

<sup>27</sup> *Ibid.*, at [22].

<sup>28</sup> *Ibid.*, at [25].

the professional indemnity policy, a view subsequently accepted in litigation between the Registrar-General and LawCover.<sup>29</sup> Ms Pedulla was entitled to \$3.8 million, plus her legal costs, which as noted amounted to in excess of \$329,000.<sup>30</sup> Her costs subsequently being accepted as reasonable and compensable,<sup>31</sup> with the court noting that there are sound reasons why the amount and recognition of legal fees associated with Torrens claims should be regarded more generously than the way costs are awarded in ordinary proceedings.<sup>32</sup> ‘The clear legislative intention appears to me that a person in [the position of claiming under the assurance fund] should not be left out of pocket — except to the extent that costs have been unreasonably incurred.’<sup>33</sup>

This sorry tale, with its elements of religion, relationships, flight from the law, and money, is one of those rare circumstances in which the Torrens system of land registration attracts the attention of the mainstream media.<sup>34</sup> But how could it have been avoided, or if it couldn’t have been avoided in any simple manner, was there a way in which compensation could have flowed to Pedulla without the stress, expense and delay of legal proceedings. In our next section, we examine the possibility that title insurance may well have operated more quickly to resolve the claim of Pedulla, and without the incursion of high legal fees. After that we consider the recent amendments in New South Wales and Queensland, and note that they would not have prevented the fraud. Finally, we show how the verification of identity requirements now being introduced under the guise of the e-conveyancing rules would not have prevented Panetta and his partner from leaving Australia with their ill-gotten gains. We conclude that it was only the presence of title insurance that would have seen a superior outcome for the Calabrian nun.

## Title insurance

Unlike in the United States where title insurance has an ‘ironclad foothold’ in the US economy,<sup>35</sup> title insurance has been viewed with some suspicion in Australia. The New South Wales Law Reform Commission for example, in its review of the compensation provisions of the Real Property Act 1900 (NSW) concluded that it did not support the introduction of private title insurance in Australia.<sup>36</sup> Subsequent to this review, First American Title Insurance

29 *Registrar-General of NSW v LawCover* (2013) 17 BPR 32,681; [2013] NSWSC 1471; BC201313605.

30 Pedulla was also successful in obtaining judgment against the solicitor, though his part in this sordid example was limited to 30%, the other two parties were each responsible for 35% of what went on.

31 *Pedulla v Panetta (No 2)* [2011] NSWSC 1533; BC201109832.

32 *Ibid*, at [10].

33 *Ibid*, at [10].

34 L Hall, ‘Woman awarded \$3.8m after brother sold home and fled’, *Sydney Morning Herald*, 5 December 2011, at <<http://www.smh.com.au/nsw/woman-awarded-38m-after-brother-sold-home-and-fled-20111204-1odgr.html>> (accessed 16 May 2014).

35 See M Ziemer, ‘Title insurance — The good, the bad and the ugly: Does Victoria need it?’ (2011) 20 *APLJ* 1 at 8, citing B Arrunada, ‘A transaction cost view of title insurance and its role in differing legal systems’ (2002) 27 *The Geneva Papers on Risk and Insurance: Issues and Practices* 582 at 583 that ‘at the end of the 20th century, title insurance was taken out in 85 per cent of residential sales and purchases in the United States’.

36 NSW Commission, above n 16, at [4.14].



Company of Australia Pty Ltd, trading as First Title, began offering title insurance policies for residential mortgage lenders in Australia in 1998. This was later followed by Stewart Title Ltd in 2003.<sup>37</sup> At the time of writing this article, title insurance continues to be issued in Australia by First Title and Stewart Title.

The availability of title insurance in Australia sparked fresh debate among academics as to whether there is a place for title insurance in Australia. O'Connor, for example, questioned whether the establishment of a private title insurance industry would undermine or contribute to achieving the twin objectives of security of title and ease of transfer within the Torrens system.<sup>38</sup> In 2004, responding to queries raised by practitioners following the circulation of marketing material by First Title, the NSW Property Law Committee stated that it had reservations about the impact of a system of title insurance if it were to become embedded in New South Wales before concluding that it did not see that there was any warrant for title insurance in New South Wales.<sup>39</sup> One view of title insurance is that it will lead to the dilemma of moral hazard and that its widespread use will see a decrease in due diligence and result in more title defects.<sup>40</sup> O'Connor raised the possibility that if changed conveyancing practices induced by title insurance adversely impacted on the assurance fund, governments may respond by introducing measures so as to shift the risks back to the insurers, barring title insurers from exercising the subrogated rights of the insured to claim from the fund and exclude claims on the fund by privately insured persons for losses covered by their policies.<sup>41</sup> Winton also questioned the actual likelihood of having to depend on private cover, in the face of indefeasibility, the assurance fund and professional indemnity funds.<sup>42</sup>

However there can be benefits to title insurance. Most academics agree that the Torrens assurance scheme is far from perfect<sup>43</sup> and that it is the deficiencies in the scheme to which title insurance can provide relief. O'Connor examines these gaps in the Torrens assurance scheme in detail, dividing the deficiencies into two categories — gaps in the legal security and gaps in the economic security. The former relates to limitations arising from the compensation provisions itself, for example, indefeasibility provisions contain exceptions (exceptions to indefeasibility), known as overriding interests. Where there is an overriding interest, title insurance can provide cover against the risk of losses caused by overriding interests.<sup>44</sup> The economic risks arise out of the process and rules associated with making a claim.<sup>45</sup> It is

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37 P O'Connor, 'Title insurance-Is there a catch?' (2003) 10 *APLJ* 120.

38 P O'Connor, 'Double indemnity — Title insurance and the Torrens System' (2003) 3(1) *QUTLJ* 142 at 143.

39 NSW Law Society Property Law Committee, 'Drawbacks to title insurance' (2004) 42(11) *LSJ* 70 at 71.

40 N Winton, 'Title insurance in a Torrens context' (2007) *Polemic* 49 at 51; O'Connor, above n 38, at 149.

41 O'Connor, above n 38, at 149.

42 Winton, above n 40, at 52.

43 See, eg, L Griggs, 'The Assurance Fund: Government Funded or Private?' (2002) 76 *ALJ* 250.

44 O'Connor, above n 38, at 154.

45 Ibid, at 150–64. See also J Flaws, 'Compensation for loss under the Torrens System — Extending State Compensation with Private Insurance',

generally agreed that claiming under the Torrens assurance scheme is not without difficulties. As noted in this article, in some states the fund still operates as a fund of last resort which can cause hardship to claimants.<sup>46</sup> Another advantage of title insurance is that it indemnifies the insured on a no-fault basis whereas the trend in the state-based indemnity schemes is to restrict the right to indemnity by introducing or extending fault-based exclusions.<sup>47</sup> In addition, the insurer has a duty to defend challenges to the insured's title, which includes the payment of necessary costs, legal fees and expenses incurred in that defence,<sup>48</sup> though opinion is divided as to whether the realities of business will see title insurance companies, disputing the claims rather than paying out claims or defending challenges.<sup>49</sup> Some state compensation schemes have a limitation period for commencing an action, the periods ranging from 6 years to 20 years.<sup>50</sup> The presence of such limitation periods only giving cause for further utilisation of title insurance. Title insurance does not have such limitation periods as the cover is forever and no excess is charged even in the event of a claim.<sup>51</sup> The delay and difficulty in claiming compensation under the state guarantee of title is also an issue. As noted by the NSW Law Reform Commission there is a 'quite repulsive tenacity with which some jurisdictions are prepared to resist even valid claims upon the fund. Some claimants become so frustrated with litigation that they decide to bear the loss themselves.'<sup>52</sup> The delay, frustration and resistance in meeting valid claims are evident in the case of Ms Pedulla.

### Would title insurance have aided Ms Pedulla?

To answer this question, the authors examine the policies available from Stewart Title and First Title, pinpoint analogous case examples provided by First Title and Stewart Title and apply these to Ms Pedulla's predicament.

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at <<http://www.firsttitle.com.au/media/10545/Media%20-%20Compensation%20for%20loss%20-%20Jonathan%20Flaws.pdf>> (accessed 5 June 2014) discussing these gaps in relation to the NZ Land Transfer Act 1952.

46 O'Connor, above n 38, at 163.

47 Ibid, at 159 and 162.

48 See, eg, Stewart Title's purchaser residential policy cl [1.2] and First Title Home Owners GOLD policy cl [4]. See also Flaws, above n 45, p 12 providing an example on how the duty to defend would operate and stating that internationally, 45% of all payments under title insurance policies are paid to lawyers to assist in resolving claims relating to covered risks.

49 See M Ziemer, 'Title insurance — The good, the bad and the ugly: Does Victoria need it?' (2011) 20 *APLJ* 1 at 26, citing the Alberta Land Surveyors' Association. On this point, Caroline Younis noted that since First Title started in Australia, First Title had developed a very solid claims history and thus far have not denied any fraud claims: Email from Caroline Younis, General Counsel, First Title, to Rouhshi Low, 14 August 2014.

50 A Bradbrook, S MacCallum, A Moore and S Grattan, *Australian Real Property Law*, 5th ed, Thomson Reuters, at [4.700].

51 O'Connor, above n 38, at 163 and Ziemer, above n 49, at 27. See, eg, First Title's Home Owners GOLD policy cl [6.1] at <[http://www.firsttitle.com.au/media/9422/Policy\\_Wording\\_%5BEHOG%5D\\_%5BLR%5D.pdf](http://www.firsttitle.com.au/media/9422/Policy_Wording_%5BEHOG%5D_%5BLR%5D.pdf)> (accessed 13 June 2014) and Stewart Title's Residential Purchaser Policy cl [4.1] at <[http://www.stewartau.com/multimedia/Residential\\_Purchaser\\_Policy.pdf](http://www.stewartau.com/multimedia/Residential_Purchaser_Policy.pdf)> (accessed 13 June 2014).

52 New South Wales Commission, above n 16, at [2.40]. Also see Ziemer, above n 49, at 27.



### (a) Available policies

For residential properties, First Title offers a residential home owner's policy called Home Owners GOLD,<sup>53</sup> which covers the homeowner or purchaser against various risks including fraud. The premium paid is a one-time premium and the amount of premium payable varies depending on the value of the property, for example, for a residential property valued at less than \$500,000 the premium payable for a purchaser is \$359.70 and for a homeowner \$479.60.<sup>54</sup> The Stewart Title Residential Purchaser Policy provides protection to purchasers and existing home owners. The range of risks covered also includes fraud.<sup>55</sup> Similar to First Title, the premium is a one-time premium, the amount varying depending on the value of the property. For example, the premium for property valued less than \$500,000 is \$359.70.<sup>56</sup>

The residential policies in both Stewart Title and First Title insure against actual loss resulting from the covered risks for up to 200% of the purchase price of the property.<sup>57</sup>

### (b) Case examples

The authors contacted both First Title and Stewart Title to request for data on the number and type of policies issued in Australia and the value of claims paid. First Title were unable to release the value of claims paid on any type of claim but provided the authors with some examples of fraud claims that First Title paid:<sup>58</sup>

- The gambling ex-husband: The insured and her husband had been separated for some time. The husband continued to reside in the matrimonial home. The husband re-mortgaged the home to pay his

53 A sample policy wording of the Home Owners GOLD policy is available at <<http://www.firsttitle.com.au/property-owners/about/brochures-and-forms>> (accessed 13 June 2014).

54 The premium schedule is available at <[http://www.firsttitle.com.au/media/17282/Premium%20Schedule\\_QLD\\_AUG13.pdf](http://www.firsttitle.com.au/media/17282/Premium%20Schedule_QLD_AUG13.pdf)> (accessed 13 June 2014).

55 A sample policy wording of the Residential Purchaser Policy is available at <<http://www.stewartau.com/public/ResidentialPurchaser.html>> (accessed 13 June 2014).

56 The premium schedule is available at <<http://www.stewartau.com/public/PremiumSchedules.html>> (accessed 13 June 2014).

57 For Stewart Title see cl [1] of the Residential Purchaser Policy <[http://www.stewartau.com/multimedia/Residential\\_Purchaser\\_Policy.pdf](http://www.stewartau.com/multimedia/Residential_Purchaser_Policy.pdf)> (accessed 13 June 2014). For First Title see cl [3] and [6.2] in the Home Owners GOLD Policy, <[http://www.firsttitle.com.au/media/9422/Policy\\_Wording\\_%5BEHOG%5D\\_%5BLR%5D.pdf](http://www.firsttitle.com.au/media/9422/Policy_Wording_%5BEHOG%5D_%5BLR%5D.pdf)> (accessed 13 June 2014).

58 Email from Caroline Younis, General Counsel, First Title, to Rouhshi Low, 25 June 2014. First Title also brought to the authors attention the various fraud cases that First Title were involved in, including *Perpetual Trustees Victoria Ltd v Tsai* (2004) 12 BPR 22,281; *Chandra v Perpetual Trustees Victoria Ltd* (2007) 13 BPR 24,675; *Mitchell Morgan v Vella* (2011) 16 BPR 30,189 (NSWCA); *Hunt & Hunt v Mitchell Morgan* (2013) 247 CLR 613; 296 ALR 3; [2013] HCA 10; BC201301509; *Perpetual Trustees Victoria v Ann-Marie Menzies* [2009] NSWSC 352; BC200903509; *Perpetual Trustees Victoria Ltd v Menzies* (2012) 16 BPR 31,541; [2012] NSWSC 1066; BC201210440; *Perpetual Trustees Victoria Ltd v Menzies (No 2)* [2013] NSWSC 290; BC201301898; *Perpetual Trustee Company Ltd v El-Bayeh* (2010) 15 BPR 29,353; [2010] NSWSC 1487; BC201009914; *Perpetual Trustee Company Ltd v CTC Group Pty Ltd* [2012] NSWCA 252; BC201206238.

gambling debts, he forged his wife's signature on the documents. All was well until the loan repayments ceased and the husband informed the wife that the house was being possessed by the lender.

- The entrepreneurial son: The son took out a mortgage over his parents' house, the parents, who did not speak or read fluent English thought they were going guarantor on a loan. The son lost all the money in a failed business venture and then failed to make the loan repayments. The lender commenced possession proceedings. The retiree parents were then put on notice that the documents they had signed were actually transferring the property out of the mother's name and into the son's name and then taking out a mortgage on that property in the father and son's name.
- The way-ward Power of Attorney: The borrower provided her two children (son and daughter) with a joint POA. The borrower suffered from dementia. The son took a loan out in his name and the borrower's name using the POA to execute the documentation on behalf of the borrower. A solicitor certified the documents and the funds were advanced. The daughter became aware of the fraud and contacted solicitors to rectify the fraud against her mother's title.
- The shifty business partner: The borrower and the fraudster entered into a business arrangement and opened a joint bank account. The fraudster took out a loan in the borrower's name and had it paid into the joint account, the borrower's property was used as security. The alleged fraudster withdrew all the funds and disappeared. The borrower was surprised to find that the loan had been taken out and that his property had been used as the security.
- The trusting friend: The borrower had an unencumbered title which came to the attention of a well-known crime figure, who the borrower considered a friend at the time. A loan was taken out over the borrower's property which she denied any knowledge of. The borrower says she only became aware of the loan when the possession proceedings were commenced. It was alleged that the fraudster must have intercepted the mail between the borrower and the lender.

According to Caroline Younis, where the claims involved litigation, one of the benefits of having title insurance is that the cost of the legal fees and expenses associated with the claim is borne by First Title and there is no limit on this.<sup>59</sup>

Stewart Title provided three case examples on their website:

The Dominicks owned a home and were the victims of a fraud committed by Mr Dominick's brother. The brother stole the identity of Mr Dominick and obtained a \$120,000 mortgage over their home. When the mortgage went into default, the lender, Cass Comm, contacted the Dominicks for payment. It was then that the Dominicks discovered what had happened and as a result, they refused to make payment on the grounds that they didn't sign the mortgage and they didn't receive any money. Although the brother was sent to jail for the forgery, Cass Comm sued the Dominicks and the court held that the mortgage was valid and Cass Comm was

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<sup>59</sup> Email from Caroline Younis, General Counsel, First Title, to Rouhshi Low, 25 June 2014.

allowed to take possession of the home to recover their debt. The Stewart Title Existing Owner Policy compensates home owners for losses resulting from fraudulent mortgages registered against their title. Under the coverage provided by a Stewart policy, the Dominicks' ownership in their property would have been protected and the costs associated with removing the Cass Comm mortgage from their title would have been covered by us.<sup>60</sup>

After settlement but prior to registration of the mortgage, the insured lender became aware that the borrowers were actually fraudsters who had used stolen identities and stolen bank cheques in the transaction. The loan is now in default and the insured lender's security is unable to be registered due to caveats being lodged on the title. Stewart Title indemnified the insured lender in accordance with the Commercial Lender Policy. Under the policy Stewart Title is responsible for all legal costs and expenses in resolving the issue on behalf of the lender.<sup>61</sup>

A lender insured by Stewart Title was sued by a prior owner of the mortgaged property. The insured lender had advanced funds to a person claiming to be the owner of the property to finance the purchase of the mortgaged property. Less than a year later, the lender was sued by a woman who had, with her husband, owned the property for a number of years. She claimed that her signature on the transfer, as well as a series of mortgages were all forgeries. She claimed that title to the property should be returned to her, and enforcement proceedings by the lender halted until the matter of the fraud was resolved.<sup>62</sup> In this case, Stewart Title under the defence of title provision in the Policy defended the enforceability of the insured mortgage. This meant, amongst other things, that Stewart Title paid the legal fees and associated costs from the time of notification of the claim to the conclusion of proceedings.<sup>63</sup>

Applying these cases to Ms Pedulla:

- The nature of Ms Pedulla's claim is a risk that is covered by either insurance company in their residential home owner policy;
- Ms Pedulla would need to complete and lodge a claim form in which she must provide a brief summary of the facts giving rise to the claim and a value of the loss if known;<sup>64</sup>
- The insurance company would then decide on how to resolve the claim. Using Stewart Title as an example, the options include payment of the loss sustained by the insured, negotiating a settlement, litigation to prosecute or defend a case;<sup>65</sup>
- In Ms Pedulla's case, as the house has already been sold and the fraudsters having flown the country, the available option may be payment of the loss sustained by Ms Pedulla;

60 Stewart Title, 'Title Insurance for Home Owners', <[http://www.stewartau.com/multimedia/brochures/Home-Owners\\_Brochure.pdf](http://www.stewartau.com/multimedia/brochures/Home-Owners_Brochure.pdf)> (accessed 13 June 2014).

61 Stewart Title, 'Recent Lender Claims', <<http://www.stewartau.com/public/ClaimsInfo63.html>> (accessed 13 June 2014).

62 Ibid.

63 Ibid.

64 See, eg, the Stewart Title residential purchasers and existing owners claim form, at <<http://www.stewartau.com/PUBLIC/multimedia/PurchaserClaimForm.pdf>> (accessed 13 June 2014).

65 Stewart Title, 'Our Claims Philosophy', at <<http://www.stewartau.com/public/ClaimsInfo15.html>> (accessed 13 June 2014).

- In this case, the actual loss suffered would be \$3.8 million and that would be the amount paid out to Ms Pedulla;<sup>66</sup>
- There would be no need for Ms Pedulla to incur legal costs because these would be borne by the insurance company;
- As the insurance policy would indemnify Ms Pedulla on a no-fault basis, the issue faced by Ms Pedulla in her court action as to whether compensation would not be payable because the loss was occasioned by the conduct of Ms Pedulla would not be a cause for concern if she had title insurance;
- Similarly, with title insurance, there would not be an issue of whether compensation would not be payable because of the actions of the solicitor; and,
- With title insurance, Ms Pedulla would not have to contend with the Registrar General resisting her claim for compensation.

It would seem that title insurance would have operated more quickly and efficiently to resolve Ms Pedulla's claim thereby averting the stress and delay incurred by Ms Pedulla in her legal proceedings.

Ms Pedulla's case could be classed as the usual type of fraud cases that typically occur in Australia — where the fraudulent person is someone known to the victim of the fraud, such as the spouse or children. It was rare for frauds to be perpetrated by professional criminals. Unfortunately, a spate of professionally perpetrated frauds in Western Australia has caused growing concern that professionally executed land title frauds are on the rise in Australia. In these cases, the fraudsters will have at their disposal sophisticated technological devices that can be used to forge identity documents, making the fraud virtually undetectable.<sup>67</sup> The state's response to fraud has been to shift responsibility to the stakeholders in the conveyancing

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<sup>66</sup> Caroline Younis was able to confirm that had Ms Pedulla had title insurance, the actual loss of \$3.8m would have been paid out to her by First Title: Email from Caroline Younis, General Counsel, First Title, to Rouhshi Low, 14 August 2014.

<sup>67</sup> See R Low and L Griggs, 'Identity Verification in Conveyancing: The Failure of Current Legislative and Regulatory Measures, and Recommendations for Change' (2012) 76(5) *The Conveyancer and Property Lawyer* 363, discussing the Mildenhall fraud that occurred in Western Australia which involved Nigerian fraudsters using fake identity documents to sell the owners house when the owner was overseas. Mr Mildenhall has received compensation, though the precise terms of settlement are confidential. Subsequent to the Mildenhall fraud, another attempted fraud in Western Australia was reported, the facts of which bear a striking resemblance to the Mildenhall fraud: 'Man arrested in Nigeria over attempted real estate fraud in Western Australia', at <<http://www.abc.net.au/news/2013-08-15/arrest-in-nigeria-over-real-estate-fraud/4890178>> (accessed 10 June 2014). In 2014, a similar fraud was reported to have occurred in the Australian Capital Territory (see Australian Federal Police, 'Police Investigating Real Estate Fraud', at <<http://www.police.act.gov.au/media-centre/media-releases/act/2014/july/police-investigating-real-estate-fraud.aspx>> (accessed 18 August 2014) which led Landgate, the WA Department of Commerce and the WA Police to issue a joint media statement warning property professionals to be vigilant when identifying their clients as the true owner when selling and otherwise transacting in property (see Landgate, 'Agent Alert Issued following Real Estate Fraud in ACT', at <[http://www.landgate.wa.gov.au/docvault.nsf/web/AU\\_NM\\_MEDIA\\_2014/\\$FILE/2014-07-24-Agent-alert-following-real-estate-fraud-in-ACT.pdf](http://www.landgate.wa.gov.au/docvault.nsf/web/AU_NM_MEDIA_2014/$FILE/2014-07-24-Agent-alert-following-real-estate-fraud-in-ACT.pdf)> (accessed 18 August 2014).

process, namely, the mortgagee.<sup>68</sup> For example, in Queensland, s 11 of the Land Title Act 1994 provides that the mortgagee must take reasonable steps to verify identity, where a failure to do so would result in the mortgagee unable to rely on indefeasibility (s 185(1A)). In New South Wales, mortgagees are similarly required to take reasonable steps to ensure that the person who has executed the mortgage is in fact the person whom they are representing. A failure to do this could lead to the Registrar-General refusing to register the mortgage.<sup>69</sup> Western Australia issued its new verification of identity rules in July 2012, full compliance expected on documents lodged on and after 2 January 2013. The rules were initiated as a response to the professional frauds and is said to be a higher standard of verification of identity than has been used in the past.<sup>70</sup> The new rules recommend that conveyancers and other property professionals take reasonable steps to verify the identity of their clients and confirm their clients' authority to give instructions when dealing with a particular property. In verifying the identity of a client, the rules expound two fundamental requirements:<sup>71</sup>

- First, a person transacting on a property should be able to produce current, original identity documents, preferably with photographs.
- Second, a visual verification or 'face to face' is required, which is the practice of checking that the photograph on the identity document is the person being identified.

If a person is outside of Australia, the verification of identity and the witnessing of land documents should be conducted by an Australian Consular Officer.<sup>72</sup>

As noted by the authors in an earlier article, stringent identity verification rules, particularly rules that mandate face-to-face identity verification, will assist in preventing fraud.<sup>73</sup> However, as recognised by Landgate, 'fraudsters constantly change the way they operate. They take advantage of opportunities as they arise',<sup>74</sup> such that vigilance is constantly required. In addition, conveyancers and property professional are not forgery experts and there will be cases when fraudsters are able to slip through the cracks despite all efforts at complying with identity verification requirements. When the state assurance fund can be difficult and costly to access as evident in Ms Pedulla's claim, could market mechanisms be the key in resolving this inefficiency with private title insurance?

Another more pressing concern is the advent of electronic conveyancing. Would title insurance have a greater role to play in this era of technological

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<sup>68</sup> L Griggs and R Low, 'Identity Fraud and Land Registration Systems: An Australian Perspective' (2011) 75(4) *The Conveyancer and Property Lawyer* 284 and Low and Griggs, above n 67.

<sup>69</sup> Real Property Act 1900 (NSW) s 56C; Real Property Amendment Regulations 2011 (NSW), now incorporated in the Real Property Amendment Regulations 2008.

<sup>70</sup> Landgate, 'Verification of Identity', at <[http://www.landgate.wa.gov.au/docvault.nsf/web/PS\\_TR\\_VI/\\$FILE/VOIBRO.pdf](http://www.landgate.wa.gov.au/docvault.nsf/web/PS_TR_VI/$FILE/VOIBRO.pdf)> (accessed 13 June 2014).

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

<sup>73</sup> Low and Griggs, above n 67.

<sup>74</sup> Landgate, 'Verification of Identity Information Session', at <[http://www.landgate.wa.gov.au/docvault.nsf/web/PS\\_TR\\_VI/\\$FILE/InfoSession.pdf](http://www.landgate.wa.gov.au/docvault.nsf/web/PS_TR_VI/$FILE/InfoSession.pdf)> (accessed 13 June 2014).

reform? We ask this question because much of the academic literature on the role of title insurance in Australia (as distilled in this article) preceded the nationwide adoption of a national electronic conveyancing system.<sup>75</sup> While O'Connor did note the trend in some state governments of seeking to protect the assurance fund by shifting losses back to the victims if they or their agents can be said to have contributed to the loss by their conduct,<sup>76</sup> we can see this trend taking tangible shape with the arrival of a national electronic conveyancing system (NECS), particularly in the proposed rules for verification of identity. It is therefore pertinent to re-examine the role of title insurance within Australia's newly adopted national electronic conveyancing system. This is the focus of the next section of our article.

### **Re-examining the role of title insurance in light of the Australian NECS and the shifting of responsibility on stakeholders**

The idea of a national electronic conveyancing system was mooted since the early 1920s but it is not until the last few years that we finally see this idea come to fruition.<sup>77</sup> The key legislation enabling the adoption of a nation-wide electronic conveyancing system is the Electronic Conveyancing (Adoption of National Law) Act 2012 (NSW). The Act establishes the right to lodge documents electronically and to create a mutually accessible electronic workspace for stakeholders involved in the transfer of land. Existing to support the operation of the legislative framework lies the Model Operating Requirements (MOR) and the Model Participation Rules (MPR).<sup>78</sup> Both the Model Operating Requirements and Model Participation Rules have been the subject of numerous stakeholder consultation sessions. This is unsurprising given their role but another reason for their intense scrutiny is that both documents cover uncharted territories. Some conveyancing practices and processes may remain the same but the introduction of NECS will also see new processes being put in place, requiring new rules to govern these processes. One example would be rules requiring subscribers<sup>79</sup> to obtain client authorisation (cl 6.3 and Sch 4) and to take reasonable steps to verify the identity of their clients (cl 6.5), whereby compliance with the verification of identity standard specified in Sch 8 will be deemed to constitute reasonable

<sup>75</sup> With perhaps the exception of the paper by Flaws, above n 45, which had a section on title insurance and the automated register (p 18) though this is in relation to the NZ automated system, not the Australian national electronic conveyancing system.

<sup>76</sup> O'Connor, above n 38, at 161.

<sup>77</sup> The rollout schedule for the national electronic conveyancing system is available from <<http://www.pexa.com.au/TheLegalFramework>> (accessed 10 June 2014). At the time of writing, deployment of the system will begin in New South Wales and Victoria in 2014, followed by Queensland and Western Australia in February and May 2015 and South Australia, Tasmania and the Northern Territory in the third quarter of 2015.

<sup>78</sup> The MPR is available at <[http://www.arnecc.gov.au/publications\\_model\\_participation\\_rules](http://www.arnecc.gov.au/publications_model_participation_rules)> (accessed 13 June 2014) and the MOR is available at <[http://www.arnecc.gov.au/publications/model\\_operating\\_requirements](http://www.arnecc.gov.au/publications/model_operating_requirements)> (accessed 13 June 2014).

<sup>79</sup> Electronic Conveyancing National Law s 3 defines a subscriber as 'a person who is authorised under a participation agreement to use an ELN to complete conveyancing transactions on behalf of another person or on their own behalf'.



steps.<sup>80</sup> As noted by the authors in relation to the verification of identity standard in Sch 8, there is no parallel in Australia to this in terms of paper-based conveyancing. Another change would be the use of digital signatures in place of manual signatures. Unlike current practices, in the NECS, subscribers to the system (ie, those authorised to use the system, such as lawyers) will digitally sign electronic documents prepared on NECS on behalf of their clients (such as a home owner). The use of digital signatures necessitates the obtaining of digital signing keys to enable the creation of the digital signatures and the need to keep the signing key safe so that unauthorised personnel cannot create digital signatures to perpetrate fraud. The NECS will also see new stakeholders involved in the conveyancing process, such as the Electronic Lodgement Network Operator (ELNO) whose function it is to provide and operate an Electronic Lodgement Network (ELN) which is an electronic system that enables the lodging of registry instruments and other documents in electronic form for the purposes of the land titles legislation.<sup>81</sup>

One major question arising out of the adoption of NECS is who would bear the loss in the event of fraud? The verification of identity standard requiring face-to-face verification of identity (Sch 8 cl 2.1) is a step in the right direction in minimising fraud. Less fraud would mean less stress on the assurance fund. However, not all frauds are detectable despite face-to-face identity verification. Intriguingly, *Pedulla* is one such fraud. As it involved a solicitor as a party to the wrongdoing, it is reasonable to assume that in an electronic environment the fraud would be as easily perpetrated. The solicitor as subscriber to the system could forge the client authorisation forms and his role as a stakeholder would allow access to the ELN. In effect, the risk of wrongdoing here was no more or less in an electronic as against a paper environment. Contrast this matter with that of *Perpetual Trustee Company Ltd v El-Bayeh*.<sup>82</sup> David El-Bayeh was the registered proprietor of land on which there was a mortgage in favour of Perpetual Trustee Company. The defendant alleged his signature had been forged, purportedly by the hand of his older brother Youseff (a claim denied by Youseff). The loan had originated from the offices of CTC Group Ltd, a mortgage originator with a commercial relationship with Perpetual. The relevant documents prepared to support the mortgage had been considered by one Naaman, an employee of CTC. In terms of unravelling this saga, Naaman could not be called to give evidence, he had left Australia to conduct business in Lebanon and indicated that he never intended to return.<sup>83</sup> Naaman had indicated that David El-Bayeh had signed in his presence and had provided a passport, rates certificate, and Medicare card to verify identity. The evidence presented to the court was that all members of the El-Bayeh family would have had access to these documents. As noted by

80 For a more in depth discussion of the verification of identity standard in Sch 8, refer to R Thomas, R Low and L Griggs, 'Australasian Torrens Automation, Its Integrity, and the Three Proof Requirements' (2013) *NZLR* 227.

81 See ss 13 and 15 of the Electronic Conveyancing National Law. The Electronic Conveyancing National Law appears as an appendix to the Electronic Conveyancing (Adoption of National Law) Act 2012 (NSW).

82 [2010] 15 BPR 29,353.

83 *Ibid*, at [39].

her Honour, McCallum J, if David El-Bayeh had not signed the documents, three options were possible:<sup>84</sup>

- i) Someone had impersonated David El-Bayeh;
- ii) Naaman had negligently presented the documents to Perpetual with such documents not being prepared and attested in the presence of David El-Bayeh; or
- iii) The speculative possibility that Naaman was a knowing participant in some type of fraud.

Although her Honour was suspicious, she was not persuaded that Naaman was anything other than a victim of fraud, the land documents were undoubtedly fraudulent, the mortgage not permitted to stand on the register, the mortgage documents not securing anything.<sup>85</sup>

Would this fraud have been detectable under the electronic framework against a backdrop of NSW requirements that the mortgagee verify identify? Assuming Naaman was not party to the fraud, the verification of identity requirements would have been likely met by Naaman. He allegedly conducted a face to face interview and had before him documents that should have matched the likeness of the individual in front of his desk. Verification of identity requirements would not have uncovered the fraud. Further, as the assurance fund would not have covered the loss incurred by Perpetual Trustee, any option for compensation would have to come from a mortgagees title insurance policy. While there may be sound policy reasons for denying compensation under the assurance fund in cases such as *El-Bayeh's* case<sup>86</sup> the case also highlights the complexities surrounding the assurance fund.

Further what may evolve from this type of scenario is a movement of responsibility. For example, assume the subscriber, such as CTC, has undertaken verification of identity in accordance with the MPR cll 6.4 and 6.5 and has made the necessary certifications as to identity, such certifications being relied on by the other parties to the transaction and by the ELNO and the Registrar but the identity turned out to be false.<sup>87</sup> In professionally executed identity fraud cases, it would be quite easy for the subscriber, who is not an expert at detecting document forgery, to fall prey to such forgery. Could the state shift liability for the fraud onto the subscriber based on the certifications provided by the subscriber, and thereby deny the victim of the fraud compensation under the assurance fund?

The use of technology and changed processes to accommodate this technology in NECS may see new types of frauds capable of being perpetrated in the NECS.<sup>88</sup> For example, a subscriber could be the victim of criminal hacking enabling a third party to apply the subscriber's digital signing key to

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<sup>84</sup> Ibid, at [43].

<sup>85</sup> Ibid, at [150].

<sup>86</sup> See S Grattan, 'Forged but Indefeasible Mortgages: Remedial Options', Paper presented at the Ninth Australasian Property Law Teachers' Conference, 17–19 April 2009, pp 17–21.

<sup>87</sup> [2010] 15 BPR 29,353 at [172].

<sup>88</sup> For more on new opportunities for fraud, see R Low and E Foo, 'The susceptibility of digital signatures to fraud in the National Electronic Conveyancing System: An analysis' (2009) 17 *APLJ* 1; R Low, 'Opportunities for fraud in the proposed Australian National Electronic Conveyancing System: Fact or Fiction?' (2006) 13(2) *ELaw Journal: Murdoch University*



an electronic document without the subscriber's knowledge or consent.<sup>89</sup> Alternatively the subscriber may discover that his/her digital signing key has been improperly used and notifies the ELNO as required under cl 7.9 of the MPR. The ELNO must act to prevent that electronic instrument from being presented for lodgment with the Registrar or if it is not possible to prevent lodgment, to immediately notify the Registrar (cl 7.10 of the MOR). Suppose the instrument was presented for lodgment and registered, could the subscriber argue that the ELNO should bear liability for the fraud because the reason fraud occurred was because the ELNO had not acted with sufficient speed so as to notify the Registrar and to prevent the instrument from being lodged for registration? Or would s 12 of the ECNL apply, that is, unless that subscriber is able to repudiate that digital signature, that registry instrument is to be taken to be signed by that subscriber and binding on that subscriber, on all other persons for whom that subscriber acts under a client authorisation for that conveyancing transaction, on the other parties, including their subscribers, to the conveyancing transaction and on the Registrar.

Until NECS is fully operational questions surrounding how liability will be allocated in the event of fraud and how the state will respond will continue to loom. Cases such as *Pedulla's* case show that these issues are never easily resolved and litigation can become protracted, involving multiple parties.<sup>90</sup>

For most home owners who are not regular partakers of the conveyancing market, the state assurance fund may be sufficient. For investors and commercial lenders however, these uncertainties may increase concerns regarding security of title. One option to ameliorate against this uncertainty may be market mechanisms in the form of private title insurance and it is this option that would have markedly improved the position of Ms Pedulla.

## Conclusion

The tale told her of religion, sibling betrayal and flight from law's enforcement has all the hallmarks of a Shakespearean tragedy. But where the tragedy truly lies is in the treatment of a penniless, distraught and homeless nun on her return to Australia. To require Ms Pedulla to engage solicitors, incur legal costs in excess of \$320,000 with the delay and stress that this would involve, with no guarantee that success would come her way represents an insult to commonly accepted notions of fairness. While the assurance fund ultimately compensated her, there is no doubt in the authors' minds that title insurance (and we are not so naïve as to think insurance companies will not occasionally seek to delay compensation)<sup>91</sup> would have led to a superior

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*Electronic Journal of Law* 225 and, R Low, 'From paper to electronic: Exploring the fraud risks stemming from the use of technology to automate the Australian Torrens System' (2009) 21(2) *Bond LR* 107.

<sup>89</sup> For further discussion on this, see Griggs and Low, above n 67 and Low and Foo, above n 88.

<sup>90</sup> See also Grattan, above n 86.

<sup>91</sup> On this point, Caroline Younis commented that as far as First Title is concerned, this would be an inaccurate statement because it would not be in First Title's commercial interest to act in this manner in the sense that First Title would go out of business very quickly if the market perception was that First Title did not pay any claims or deliberately slowed up settlement. According to Caroline, First Title's claims procedures and manuals dictate the

outcome, both in terms of speed to Ms Pedulla, but also in overall terms of economic welfare, with the legal costs of the Registrar and the malfeasant solicitor greatly minimised or eliminated. Interestingly, the introduction of electronic conveyancing and the increased verification of identity requirements would have had no change to the outcome. Perhaps the lesson to be learnt after all, is that given the one-off lifetime cover provided by title insurance, it is the market that will go through the obstruction identified by Sir Robert Torrens some 160 years ago.

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timeframes for the resolution of claims and further, First Title is also subject to the Financial Ombudsman Service and its terms of reference: Email from Caroline Younis, General Counsel, First Title, to Rouhshi Low, 14 August 2014.



## Debunking negligence's role in imposing a duty on the servient owner of an easement towards the dominant owner

Lynden Griggs\*

*The rights and responsibilities of servient and dominant owners in respect of right of ways is largely settled. However, one area remains unclear. Can tort law impose positive duties on the servient owner towards the dominant owner via the law of negligence? Whereas some have suggested this is the case, and recent developments in tort support this development, this article, using the paradigm of the agenda setter within property law, argues that the dominant owner should remain as the primary institution making decisions in relation to the easement. It is they that set the agenda on how the right of way is to be used, with this power emanating from the original grant given by the first servient owner. Any extension of negligence law is unnecessary, and has the potential to damage the coherency of established property law arrangements between the dominant and servient owners.*

One of the enduring issues in the doctrinal understanding of the law of easements relates to the rights and obligations that the dominant and servient owners have towards each other. Case law is replete with examples of where harmonious neighbourly relations have been soured by disputes, most typically around the extent of the obligations each party has in relation to the right of way. Property law practitioners and academics would be aware that the extant authority, at least doctrinally from property law, is strongly of the view that the obligation owed by the servient owner is simply a negative one to refrain from acts of misfeasance that would obstruct the enjoyment of the right of way by the dominant owner.<sup>1</sup> The theoretical foundation for this emanates from the idea that when the right of way is granted by the servient owner no positive obligation is attached to that grant, or to the servient land.<sup>2</sup> Should the dominant owner want to utilise the right of way granted on title, then it is this person that is responsible for the construction and maintenance of the easement. While this property law principle has been litigated and resolved, recent developments in tort law and associated academic writings suggest there are circumstances in which positive obligations will be owed from a servient owner to the dominant owner. The answer provided by this article is that given the history, tradition, and well recognised principles of property law, torts intrusion is both unnecessary, and more dangerously, has the potential to undermine the legal coherence that currently exists in the jurisprudence surrounding easements. '[I]n tort law, a possessor of land is defined in an altogether different manner than in property law',<sup>3</sup> and those

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1 P Butt, *Land Law*, 6th ed, LawBook Co, 2010, at [16107].

2 *Duncan v Louch* (1845) 6 QB 904.

3 *Wagner v Doebling* 553 A 2d 684 (1989) at 688.

differences, if applied to easement law, can undermine the structure and framework of this area of property law that is well-understood and well-recognised.

### A brief recap of the property solution

An easement is a 'right enjoyed by a person [the dominant owner] with regard to the land of another person [the servient owner], the exercise of which interferes with the normal rights of the owner or occupier of the servient land'.<sup>4</sup> The simplicity of this definition can mask the fraught emotional divide that easement disputes can cause to good neighbourly relations. In terms of the obligations that lie between the servient and dominant owners, the resolution is often context specific, though the principles are well-known. Servient owners may,<sup>5</sup> or may not,<sup>6</sup> obstruct the way with the resolution of this dependent on whether the servient owner's actions represent a substantial interference with the use of the easement.<sup>7</sup> For example, in *Boglari v Steiner School and Kindergarten*<sup>8</sup> the respondents enjoyed a right of way over the land of Boglari. Boglari installed a gate across the right of way, with this occasionally being locked. Given the nature of the dominant land as a school, and the need for parents and staff to routinely access the property, what was deemed reasonable in this context was that no gate be placed across the land. This can be contrasted with *Buckley v Timbury*<sup>9</sup> where, in a detailed examination of the authorities surrounding the installation of a gate across an easement, it was held that in the context of this rural property the installation of a solar powered access gate was not such a substantial interference that intervention by the court was warranted. *Burke v Frasers Lorne Pty Ltd*<sup>10</sup> is another illustration of the fact specific nature of these disputes. The right of way had been asphalt for many years. The servient owner sought to replace this with reinforced turf. The reason the servient owner sought to do this was to meet a planning condition around the percentage of the land that had to be

4 *Municipal District v Coles* (1906) 3 CLR 96, accepted recently in *City Developments P/L v Registrar General and the NT* (2000) 156 FLR 1; 135 NTR 1; [2000] NTSC 33; BC200002941.

5 *Bunney v South Australia* (2001) 112 LGERA 213; [2001] SASC 18; BC200100314.

6 *Guests Estate Ltd v Milners Safe Ltd* (1911) 28 TLR 59.

7 *Forestry Comrs for England and Wales v Omega Pacific Ltd* [2000] All ER (D) 17.

8 (2007) 20 VR 1; V ConvR 54-748; [2007] VSCA 58; BC200702311.

9 (2013) 17 BPR 32,187; BC201311497. Slattery J at [5]–[6] also addressed the lack of capacity of the parties to negotiate a solution:

Looked at objectively the issues that divided these parties seemed eminently capable of consensual resolution through the application of a modest degree of mutual goodwill. But despite the court encouraging some kind of consensual outcome, it has eluded the parties. And so the court must determine their differences for them.

This is unfortunate for several reasons. First, these neighbours still have to live together. And the outcome of these proceedings is unlikely to make this part of Maitland Vale a happier place for them all. Moreover, as these reasons will demonstrate, the law can provide only limited solutions to the issues that divide them. More creative and mutually satisfactory solutions for the parties may only be possible by agreement. Though the parties were bitterly divided about the matters in issue before the court, they nevertheless all appeared to the court to be people of reason and goodwill who could and would one day see past their present differences.

10 (2008) 14 BPR 26,111; [2008] NSWSC 988; BC200808309.

reserved for deep soil landscaping. While the reinforced turf would still be passable, it would not provide the same quality of access for the dominant owner. Fraser Lorne, the servient owner, argued that as access was still available to the dominant land, the substitution of reinforced turf for asphalt was of no concern. This was rejected by the NSW Court. As the dominant owner had the right to construct an access on the servient owner's land, this access could not then be replaced by an inferior, but still usable access by the servient owner. In effect, and this goes to the heart of my argument, it was the dominant owner that retained the capacity to set the agenda in relation to their property interest. Because this person has the capacity to set the agenda, legal responsibilities relating to maintenance and liability should rest on this individual.

We see a similar balancing exercise undertaken in *Mantec Thoroughbreds Pty Ltd v Batur*,<sup>11</sup> though the language in this case bears some analogy to tort law. The dominant owner wished to improve the easement to allow access by large farm vehicles and other heavy machinery. While the court accepted that a dominant tenement was permitted to undertake improvements, any such right was not unlimited – the agenda setting had to be in line with the terms of the easement and not outside its parameters. Any improvements or works could only be undertaken if they were reasonably necessary and did not cause injury to the neighbours. Habersberger J stating:

[The] defendants have an ancillary right to undertake works in respect of the easement in order to make it passable for all types of vehicles, *if those works can be performed without causing injury to the plaintiff's land*.<sup>12</sup>

Finally, in *Lawrence v Griffiths*<sup>13</sup> the dominant owner sought to construct a right of way over the servient land. This right of way would require detailed engineering and construction costs as the passage of the right of way was across the top of a gully with a severe slope on either side. In undertaking a comparative examination of common law precedent,<sup>14</sup> the court accepted that a dominant owner was entitled to construct a right of way, provided that no injury was done to the servient land. In specifically relying on the 'strongly persuasive'<sup>15</sup> Canadian decision of *Smith v Morris*<sup>16</sup> where the dispute was about the right of the dominant owner to undertake excavation works of a steep slope to allow passage over the right of way by a motor vehicle. The SA Court of Appeal held that the dominant owner was entitled to construct a road access over the right of way provided that so doing was possible within the terms of the grant and without injury being caused to the land of the servient owner.<sup>17</sup> In essence, the dominant owner set the agenda.<sup>18</sup>

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11 (2009) 25 VR 507; [2009] VSC 351; BC200907625.

12 Ibid, at [94] (emphasis added).

13 (1987) 47 SASR 455.

14 The English authority referred to by the court was *Newcomen v Coulson* (1877) 5 Ch D 133; *Gerrard v Cooke* (1806) 2 Bos & Pul (NR) 109; 127 ER 565; *Stenhouse v Christian* (1787) 1 TR 560; 99 ER 1251; *Abson v Fenton* (1823) 1 B & C 195; 107 ER 73.

15 (1987) 47 SASR 455 at 481.

16 [1935] 2 DLR 780.

17 (1987) 47 SASR 455 at 482–3.

18 Whereas these cases, and there are many more, have involved consideration around the balancing of rights in relation to a right of way, little has been said, either academically or

Beyond this, the responsibilities that each party to an easement may have towards the other seem to lie in a nebulous, if not lawless vacuum. Consider a scenario where a right of way is provided to the dominant owner over the servient land. It is the servient owner's land, though the dominant tenement has an accepted property interest in that land. Who is responsible should an injury be caused by a person coming onto that land? Does responsibility lie with the owner, or the person entitled to use that area as an easement. Anglo-Saxon authority on these questions are rare, though not surprisingly, the matter has been considered in the American context. In *Wagner v Doebling*,<sup>19</sup> the Wagners were the dominant owners. On their property they ran a boarding kennel for show dogs. The servient estate was owned by Shiling and Hess, and while they had reserved the right to use the right of way, they had not done so. The servient tenement was at the time of the incident uninhabited, the owners intending to develop the estate into a residential development at some future point. At times, unauthorised motorcycles would use the right of way, to get to a dirt pathway on the servient estate. The cyclists would drive at high speed and cause considerable tension to the Wagners. Not only were the grandchildren of the Wagners perceived to be in danger, but also the noise of the motorcycles scared the animals that were being boarded. Occasionally unauthorised parties were held on the pathway and the servient estate. Presumably to discourage such activity, the Wagner's stretched a chain between two poles at the top of the right of way. The plaintiff Doebling entered the property at midnight driving at high speed on an unlit motorcycle and without wearing a helmet. He died after hitting the chain. The father of the decedent filed a wrongful death action against the Wagners. In finding no liability attaching to the Wagners unless they had acted wantonly or wilfully in entrapping the trespasser, the court held that the resolution of this matter rested on the distinction between property and tort concepts of possession.<sup>20</sup> Whereas the property rights established the relationship between the servient and dominant owners, it was tort that defined the relationship between the possessor of the land and, in this case, the trespasser. The determinative factor in determining liability would be the degree of control one had, (or as I may describe it, the extent to which the parties can set the agenda):

We . . . hold that the holder of an easement for ingress and egress is afforded the same protection to which a landowner is entitled with respect to a trespasser, when the easement holder exercises a degree of control over the land which permits the holder to exclude trespassers from the easement. This is consistent with the rationale that a possessor of land should be free to use his land without the burden of watching for and protecting against trespassers.<sup>21</sup>

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judicially around the issue of contribution for maintenance where either the right of way is enjoyed by a number of dominant owners, or is shared between a servient and dominant owner. Peter Butt, in referencing the lack of authority suggests logic and fairness would dictate that apportionment of cost should be done on an equitable basis on proportionate use. Such a position seems unarguable: P Butt, 'Sharing the cost of Maintaining an Easement', (2014) 88 *ALJ* 603, referencing the US authority of *Baker v Hines* 406 SW 3d 21 (2013).

19 315 Md 97; 553 A 2d 684 (1989).

20 315 Md 97 (1989) at 103.

21 *Ibid*, at 107.

The court did go on to note that the duty of the easement holder would be different if the injured party had been one which the easement holder could not rightfully exclude from the premises.<sup>22</sup>

The Court of Special Appeals subsequently held, by a majority, that the actions of the Wagners were not wilful or wanton.<sup>23</sup> Critical to this seemed to be the finding that there was no reason for them to consider that people riding at high speed and without protective clothing or lighting would venture onto the property at midnight.

By contrast, a New York State Court in *Piluso v Bell Atlantic Corporation* held that the servient owner was responsible when a jogger was injured while running over the servient owner's land. The servient owner had sought to deny liability as the jogger had tripped over a utility wire the ownership of which was vested in the entity receiving the benefit of a utility easement. In finding liability, the court found that the servient owner still retained rights of control, and could have removed the hazard without interfering with the easement rights of the dominant owner. In other words, the servient owners retained control.

While these American cases are perhaps only of minor interest to an Australian court, it is the element of control that I wish to pursue as the key ingredient in determining liability and responsibility between the dominant and servient owners, particularly in respect to each other and to third parties. My argument will be, and contrary to the view of Waite,<sup>24</sup> that the circumstances in which the servient owner should be held responsible for liability to others, or that positive duties should be imposed on the servient land owner towards the dominant owner are rare. My conclusion will be that it is the dominant owner that should carry primary responsibility when a dispute arises between the adjoining landowners; such as in respect of maintenance or repairs to the right of way. In so doing, my argument stems from the application of long accepted property law principles, and not in the evolution of negligence law into this domain. In making this argument, I will first address the foundational aspect of what is property. From this I will discuss the rising influence of tort law into neighbourly relations where once property principles stood unimpeded.

### Property's role

Doctrinally property law's principles are clear. While context and fact specific, the servient owner cannot object to what is reasonably done by a dominant owner pursuant to the terms of an easement. The grant which formed the foundation of that right expressly or implicitly includes the right to construct the easement, and this right cannot be interfered with, or ameliorated, unless damage would be done to the servient land. If some damage is done, the use of the easement was beyond what was intended by the grant and this is what founds liability. In this sense, what property law did was to reflect the hierarchical supremacy of its doctrines. So, for example, it is the easement holder, the dominant tenement, which is entitled to construct the access, to

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<sup>22</sup> Ibid, at 108 n 5.

<sup>23</sup> *Doehring v Wagner* 80 Md App 237 (1989).

<sup>24</sup> 305 AD 2d 68 (2003).



decide whether it is asphalt or reinforced turf, or to object to a barrier that restricts or prevents the use of the easement (though this will only be valid if it somehow restricts the use the easement as defined by the grant). In effect, when resolving these cases what the judiciary is doing is deciding what ownership, possession or to use the feudal language, what seisin means in this context. In coming to this, property law, in the writer's view, like Katz,<sup>25</sup> is largely built on ideas that the theoretical framework for deciding what is property, and what it means to have a property interest, revolves around who can set the agenda in relation to that thing. While some suggest property is largely about exclusivity, (that is by removing others or denying others access to your land, one sets the boundary or dominion around that interest with the owner the sole, despotic decision-maker),<sup>26</sup> whereas others see it as possibly around the notion of a bundle of sticks or bundle of rights,<sup>27</sup> in my view it comes down to agenda setting. This asks us to consider who has the capacity to set that agenda, or describe the plan in relation to that proprietary interest. It encompasses notions of exclusivity and a bundle of sticks, but builds and includes these to bring a coherence to property law and its outer limits.

For example in *Yanner v Eaton*, the High Court described property in the following way, with these comments, incorporating the notion of control over access, or what I have described as agenda setting:

The word 'property' is often used to refer to something that belongs to another. But in the Fauna Act, as elsewhere in the law, 'property' does not refer to a thing; it is a description of a legal relationship with a thing. It refers to a degree of power that is recognised in law as power permissibly exercised over the thing. The concept of 'property' may be elusive. Usually it is treated as a 'bundle of rights'. But even this may have its limits as an analytical tool or accurate description, and it may be, as Professor Gray has said, that 'the ultimate fact about property is that it does not really exist: it is mere illusion. . . '.

Nevertheless, as Professor Gray also says 'An extensive frame of reference is created by the notion that "property" consists primarily in control over access. Much of our false thinking about property stems from the residual perception that "property" is itself a thing or resource rather than a legally endorsed concentration of power over things and resources.'

'Property' is a term that can be, and is, applied to many different kinds of relationship with a subject matter. It is not 'a monolithic notion of standard content and invariable intensity'. That is why, in the context of a testator's will, 'property' has been said to be 'the most comprehensive of all the terms which can be used, inasmuch as it is indicative and descriptive of every possible interest which the party can have'.

25 A J Waite, 'Developing the law of easements: the role of the tort' (1987) *Conv* (Jan-Feb) 47; A J Waite, 'Easements: Positive Duties on the Servient Owner' (1985) 44 *Cambridge LJ* 458.

26 L Katz, 'Exclusion and Exclusivity in Property Law', (2008) 58 *U Toronto LJ* 275.

27 See, eg, J E Penner, 'The Bundle of Rights Picture of Property', (1996) 43 *UCLA L Rev* 711. Sole and despotic refers to the work of Blackstone's *Commentaries*.



Because 'property' is a comprehensive term it can be used to describe all or any of very many different kinds of relationship between a person and a subject matter. To say that person A has property in item B invites the question what is the interest that A has in B?<sup>28</sup>

Similar in *Telstra v Commonwealth*, the High Court opined that:

In the present case it is also useful to recognise the different senses in which the word 'property' may be used in legal discourse. Some of those different uses of the word were identified in *Yanner v Eaton*. In many cases . . . it may be helpful to speak of property as a 'bundle of rights'. At other times it may be more useful to identify property as 'a legally endorsed concentration of power over things and resources'. Seldom will it be useful to use the word 'property' as referring only to the subject-matter of that legally endorsed concentration of power.<sup>29</sup>

What does this mean in ascertaining the correct division of responsibility between servient and dominant owners? What it suggests to me is that in deciding the concentration of power in respect of an easement dispute, one is required to consider who can set the agenda in relation to the proprietary interest. What the common law has asked us to find is where that legally endorsed concentration of power lies and this is answered by identifying who has the capacity to set the agenda. What rights from the bundle that can be enforced against the world at large, and specifically the servient owner.<sup>30</sup>

This is why I suggest the obligation of the servient tenement has, for the most part, been expressed in the negative. This land owner must simply not do anything that would impede with the right of the dominant owner to set the agenda — the grant having been made by the original servient owner and without a capacity to have it removed or taken away unless certain formalities are met. Whereas the original servient proprietor established the bounds of that agenda, in respect of one part of this land, a stick or right has been excised and placed in the hands of another. Where the agenda cannot be set, then the interest, such as the right of recreation,<sup>31</sup> struggles to be considered an easement — the holder unable to establish the parameters around what can, or can't be done with that right. When this idea of the agenda setting is seen as paramount, and the principle by which the dominant owner guides the relationship between the holder of the in rem right and the world at large, we may then view property's doctrinal thinking as paramount and governing. And to do so, weakens the role of tort. If this is our understanding, the servient owner will not have positive duties owed to the dominant tenement. The former not having the capacity to set the agenda, nor to restrict or control what the dominant landowner does.

But is this view supported by history. Waite<sup>32</sup> suggests not. His research

28 One of the earlier articles identifying this is F Cohen, 'Dialogue on Private Property' (1954) 9 *Rutgers L Rev* 357.

29 (1999) 201 CLR 351; 166 ALR 258; [1999] HCA 53; BC9906413 at [17]–[20] (references removed).

30 (2008) 234 CLR 210; 243 ALR 1; [2008] HCA 7; BC200801217 at [44].

31 For a recent discussion around the issue of the theory and importance of the notion of property, see S N Glackin, 'Back to bundles, deflating property rights, again'; (2014) 20(1) *Legal Theory* 1.

32 *Mounsey v Ismay* (1865) 3 H & C 486; *Re Ellenborough Park* [1955] 3 All ER 667; *Dukart v District of Surrey* (1978) 86 DLR (3d) 609.

identified a long series of case stemming from the 1300's which supported the notion that positive duties were accepted. He states:

[Duties] on the servient owner to repair sea-walls, river banks and gutters, to clean out ditches and other repairing obligations also appear to have ranked as easements. These duties are well established and recognised in a long line of cases.<sup>33</sup>

Despite Waite's view, which was repeated in a subsequent article in the *Conveyancer and Property Lawyer*<sup>34</sup> the modern position, at least from the perspective of property law, appears to be clear. The servient tenement has no obligation or liability to construct, maintain, or repair a right of way.<sup>35</sup> By contrast, circumstances can exist where the dominant owner may be liable for failure to repair.<sup>36</sup> The fee simple interest of the servient owner is counterpoised by the existence of the easement; it is the latter that prescribes the agenda. But is this view accepted within tort law?

### The role of tort law

What we have seen in recent times in tort law is the development, particularly in England, of a general duty to do what is reasonable in the circumstances to 'prevent or minimise the known risk of damage or injury to one's neighbour or his property'.<sup>37</sup> So for example in *Goldman v Hargrave*,<sup>38</sup> a Privy Council decision on appeal from Australian courts, it was held that in circumstances where a red gum was struck by lightning and a fire resulted in damage to the neighbour's land, the landowner on which the red gum stood was responsible. The landowner on which the tree stood had taken some measures to remove the tree, but did nothing to stop the fire from spreading, believing that it would burn itself out. The ratio of the court was that an occupier of land is under a duty to remove or reduce hazards on his or her land, irrespective of whether those hazards are man-made or natural. They did qualify, what initially may be seen as a harsh decision, by suggesting that the existence of such a duty will depend on the knowledge of the hazard, the consequences of not checking, what should have been foreseen, and the capacity to reduce that hazard. As noted by Butt, the applicability of this line of thinking in the context of a servient owner's obligations to repair an easement is that it is possible tort law will be used to implant an obligation on the servient owner, despite having granted the easement, and I would argue having transferred the capacity to set the agenda to a dominant owner.<sup>39</sup> Potentially tort law could suggest that a servient owner should remove hazards, even if not man-made that influence the use of the easement by the dominant owner.

33 A J Waite, 'Easements; Positive Duties on the Servient Owner?', (1985) 44(3) *Cambridge LJ* 458.

34 Ibid, at 461.

35 A J Waite, 'Developing the law of easements: the role of the tort' (1987) *Conv* (Jan-Feb) 47.

36 This is supported by a long line of cases, some of which are *Taylor v Whitehead* (1781) 2 Doug KB 745; *Ingram v Morecroft* (1863) 33 Beav 49; *Southwark Borough Council v Mills* [2001] 1 AC 1; [2001] ANZ ConvR 266; [1999] 4 All ER 449; [1999] 3 WLR 939.

37 *Jones v Prichard* [1908] 1 Ch 630.

38 *Leakey v National Trust* [1980] QB 485; [1980] 1 All ER 17; [1980] 2 WLR 65, 524.

39 [1967] 1 AC 645; [1966] 2 All ER 989; [1966] 3 WLR 513; the Australian High Court citation is *Hargrave v Goldman* (1963) 110 CLR 40 at 51 per Taylor and Owen JJ, 62 per Windeyer J.

Our next case for consideration is the English decision of *Leakey v National Trust for Places of Historic Interest and Natural Beauty*.<sup>40</sup> The National Trust were in ownership of a property on which there was a large conical hill. At the base of the western side of this hill, lay the titles owned by Leakey. The hill was particularly susceptible to cracking and slipping as a result of weather. A large crack was noticed and the plaintiffs notified the National Trust that the hill was liable to collapse. They offered to pay half the costs of remedial work. The offer was not taken up, and a few weeks later, the banks of the hill collapsed onto Leakey's properties. The National Trust suggested that it had no responsibility as this was the natural condition of the soil. Leakey was successful in rebutting this. There was a general duty to minimise hazards on one's land, be they man-made or natural. The duty was to 'to do which is reasonable in all circumstances, and no more than that, if anything is reasonable, to prevent or minimise the known risk of damage or injury to one's neighbour or his property'.<sup>41</sup> While this decision concerned an action in nuisance, the broader principle is very applicable to the scenario under consideration. For example from this, it would be very easy to draw an analogy that a servient owner has a positive duty to the dominant owner, and to third parties to remove hazards, irrespective of whether they were responsible for the hazard, that could foreseeably damage a neighbour.

The progeny of *Leakey* has been significant. For example in *Bradburn v Lindsay* the defendant had permissively allowed dry rot to spread from her house and infect the then adjoining property. The defendant's house was then demolished by local authorities because of the dry rot, and this left exposed a party wall of the neighbours. Following *Leakey*, the defendant was held liable for the damage to the neighbour. In *Holbeck Hall Hotel Ltd v Scarborough Borough Council*,<sup>42</sup> the hotel stood some 65 metres above the coastline. Due to natural erosion, the grounds of the hotel and part of the building collapsed into the sea. The problem had been identified and some remedial work instigated by the hotel failed to alleviate the problem. The council which had responsibility for the coastline had failed to take action to alleviate the problems. In applying *Goldman* and *Leakey*, the Court of Appeal was satisfied that a landowner could be liable where they had simply omitted to take the necessary steps to prevent damage to a neighbour. However, on the facts before the English Court, the council were not liable, the plaintiff unable to show that the council had knowledge of the problem.<sup>43</sup>

Finally, the potential effect on these cases in respect of the law of easements can be seen in *Rees v Skerrett*.<sup>44</sup> In this case the English Court of Appeal held that the owner of a property which is being demolished does owe a duty of care to a neighbour to provide adequate protection against weathering. Any concern that this decision would infringe the well-recognised rule that there

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<sup>40</sup> Butt, above n 1, at [16109].

<sup>41</sup> [1980] QB 485; [1980] 1 All ER 17; [1980] 2 WLR 65. For academic discussion around this cases and their progeny, see R A Buckley, 'March of Negligence: Has Nuisance a Future' (2007) 58 *N Ir Legal Q* 395; Hang Wu Tang, 'The Right of Lateral Support of Buildings from the Adjoining Land' (2002) (May/June) *Conv* 237.

<sup>42</sup> [1980] QB 485; [1980] 1 All ER 17; [1980] 2 WLR 65 at 83.

<sup>43</sup> [2000] QB 836; [2000] 2 All ER 705; [2000] 2 WLR 1396.

<sup>44</sup> *Ibid*, at [35].

was no easement for protection from the weather<sup>45</sup> was of no concern to the court. ‘The balance between the position of those who are neighbours (both in fact and in law) is now to be drawn differently . . .’.<sup>46</sup> And by differently, presumably the court meant differently from what the obligations in land law would have imposed.

### Critiquing torts role

While these authorities don’t directly provide a duty of care from a servient owner to a dominant owner outside and in addition to the principles that apply in property law, they certainly lead in that direction. But to extend them in such a way would be a mistake. The person who owns an interest in property has certain rights and obligations established by the bundle and defined by the extent to which that person can set the agenda. In the jurisprudence of easements, nuisance currently operates to enforce those obligations when needed. Where, in the case of an easement, you have potentially competing property rights — on the one hand, the fee simple owner, on the other, the dominant tenement — the resolution of where responsibility should lie stems from the acceptance of who can set the agenda. In the case of rights of way, this is the dominant tenement. ‘Property is not a thing but a power relationship . . . a relationship of social and legal legitimacy existing between a person and a valued resource.’<sup>47</sup> So in this power relationship who is best able to exploit the rights that they have in relation to the land? Provided the servient owner does nothing to deliberately infringe the capacity of the dominant tenement to enjoy the right of way, that power belongs to the dominant tenement. It is they who can set the agenda. An illustration of this can be seen in *Transco plc v Stockport Municipal Borough Council*.<sup>48</sup> In this case, the council were responsible for the supply of water to a block of flats. For reasons that were not discovered, a leak developed in the pipes, with the water than pooling around an embankment. This caused the embankment to collapse exposing the gas main of Transco. Transco had an easement in respect of this gas main. Given the danger of an exposed and unsupported gas main Transco quickly did emergency remedial work. It subsequently sought compensation of £93,000 from the council. Without negligence being shown Transco relied on the principle of *Ryland v Fletcher*,<sup>49</sup> but were unsuccessful. This doctrine (which no longer applies in Australia),<sup>50</sup> being only relevant where the use is shown to be extraordinary and unusual. However, what was relevant to the instant discussion were the obiter comments by Lord Scott of Foscote. His Honour remarked:

The same conclusion [that no liability to the Council should attach] can equally well be reached by considering the relationship between the council as servient owner and Transco as dominant owner of the easement under which Transco was entitled to maintain the gas main in the embankment. It is well established that a servient

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45 [2001] 1 WLR 1541; [2001] EWCA Civ 760.

46 *Phipps v Pears* [1963] 1 QB 76.

47 [2001] 1 WLR 1541; [2001] EWCA Civ 760 at [36].

48 K Gray and S F Gray, *Elements of Land Law*, 3rd ed, Butterworths, 2001, pp 93–9.

49 [2004] 2 AC 1; [2004] 1 All ER 589; [2003] 3 WLR 1467.

50 (1868) LR 3 HL 330.

owner has, in general, no positive obligation to repair or keep in good condition the servient land. Entitlement to the easement carries with it the subsidiary right of the dominant owner to carry out any necessary repairs to the servient land (see generally *Gale on Easements* 17th ed (2002), pp 51–2, para 1-86). A deliberate act by the servient owner in damaging the servient land and thereby interfering with the enjoyment of the easement would be actionable in nuisance. *In principle I can see no reason why a servient owner should not owe a duty of care to the dominant owner not to damage the servient land so as to interfere with the enjoyment of the easement. But it would, it seems to me, be contrary to principle to hold a servient owner liable to the dominant owner for damage to the servient land, or for any other interference with the easement, caused neither by a negligent act nor by an intentional act of the servient owner.*<sup>51</sup>

What Lord Scott of Foscote seems to be implying is that given the well-recognised liability in nuisance of a servient owner who seeks to interfere with the rights of a dominant owner, the extension to negligence and the establishment of a duty of care is unnecessary. As noted recently by the High Court, the ‘problems in determining the duty of care “may sometimes concern the need to preserve the coherence of other legal principles”’.<sup>52</sup> I would suggest that this is such an area. The extension of the duty of care only complicates an arrangement which is adequately covered by property law. The coherence of the legal relationship between dominant and servient owner undermined by any unnecessary imposition of tort law.

### Where to from here

Land ownership is unique, distinct, and involves both rights and increasingly, a sense of obligation or community to ones neighbours. In doing this, property ownership has emerged from the exclusive ideas of dominion or despotic control of Blackstones *Commentaries* to a scenario where, there is a sense of mutual, communal, neighbourly responsibility. ‘Far from being an untrammelled right, property is liable to be curtailed on all sides by an interpenetrating sense of civic responsibility.’<sup>53</sup> We can build on this without the necessity to influence or impede property’s rules with the application of negligence law. ‘Property law is the only generalisable device that operates between persons whose relationship consists solely of mutual interaction with a thing.’<sup>54</sup> Easement law involves competition or priority setting between people over the one thing. The way to resolve this is not to go down the path of a generalised standard in negligence of a duty owed by a neighbour to another — these principles can sit and be applicable where property law has no role. Legal coherence is undermined where negligence occupies space where centuries of common law thinking have struck a balance between the

51 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520; 120 ALR 42; [1994] HCA 13; BC9404607.

52 [2004] 2 AC 1; [2004] 1 All ER 589; [2003] 3 WLR 1467 at [80] (emphasis added).

53 *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 313 ALR 408; (2014) 88 ALJR 911; [2014] HCA 36; BC201408266 at [25] per French J, quoting from *Sullivan v Moody* (2001) 207 CLR 562; 183 ALR 404; [2001] HCA 59; BC200106147 at [50].

54 K Gray and S F Gray, ‘The Idea of Property in Land’ in *Land Law Themes and Perspectives*, S Bright and J Dewar (Eds), Oxford, 1998, pp 1, 41.

rights and obligations of the warring parties.<sup>55</sup> In the case of easements and disputes between the dominant and servient tenement, property law has a history and provision of rules that can resolve the most modern of disputes. We see evidence of this capacity in *Clos Farming Estates v Easton*.<sup>56</sup> At its heart, the question asked of the court was whether the right to operate a vineyard could qualify as an easement. In saying no, Bryson J at the trial level,<sup>57</sup> made the following comments:

This is a novel scheme of ownership with rights of ownership not known to the law. It is a re-invention, and an imposition on freehold title, of the substance of the scheme of manorial and copyhold title which existed in England centuries ago and has been abolished there, but was never introduced into Australia. In my opinion the law of easements cannot be used to change the nature of freehold ownership in this way and to create a substantially different kind of land title. The freeholders are neutralised and powerless, unable to control or in truth to influence what is to happen on their agricultural land. Putting the land to its highest and best use is impeded, to the detriment of the public interest as well as the interests of the freeholders.<sup>58</sup>

My thoughts echo this sentiment. To introduce negligence law into the relationship between the dominant and servient owner would be to create a substantially different kind of land interest, one that is uncertain, unstable, and subject to ongoing adjudication. The law of easements is well known, the servient tenement cannot interfere with the access granted by the right of way to the dominant tenement, but it is the dominant tenement that can set the agenda in terms of how that way is to be constructed, and how it is to be maintained. Waite suggests that:

The next logical step is to destroy or at least modify [the traditional easements rule]. The rule might be that the servient owner owes a duty of care to the dominant owner to ensure that the servient tenement is sufficiently well repaired to avoid damage to the dominant owner or to the dominant tenement.<sup>59</sup>

He goes on to further suggest that the common law's motif is to provide solutions and that there is 'no good reason for stultifying necessary progress by reference to artificial boundaries between different areas of the law'.<sup>60</sup> This is where I fundamentally disagree. To move beyond where we are by establishing some nebulous responsibility on the servient tenement is both undesirable and simply unnecessary. Working from the foundation principles of what is a property interest, the control, or agenda setting from the bundle of rights rests with the dominant owner. To reach beyond this paradigm is to weaken the incidents of ownership that have been refined and considered and understood for many centuries. There is no evidence that an overarching

55 L Bennett Moses, 'The Applicability of Property Law in New Contexts: From Cells to Cyberspace' (2008) 30(4) *Syd LR* 639 at 641.

56 See the comments in *Sullivan v Moody* (2001) 207 CLR 562; 183 ALR 404; [2001] HCA 59; BC200106147 at [42].

57 (2001) 10 BPR 18,184.

58 On appeal the decision of Bryson J was upheld: *Clos Farming Estates Pty Ltd v Easton* (2002) 11 BPR 20,605.

59 (2001) 10 BPR 18,184 at [50].

60 A J Waite, 'Developing the law of easements: the role of the tort' (1987) Jan-Feb, *Conv* 47 at 49.

reconceptualization of the duty between the dominant and servient tenement is necessary. Any such move must be resisted.



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# Developing the ultimate cadastre: Using indefeasibility to guarantee geodetic defined land boundaries

Lynden Griggs\*

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*Boundary disputes between neighbours can often escalate beyond their objective economic worth. The law has provided many approaches to resolve these disputes. These measures have included the law of adverse possession, encroachment legislation, rectification of the title register, survey adjudication based upon the competing opinions of land surveyors, as well as reliance on the good sense of neighbours to resolve these matters amicably. However, one thing is clear in the law – the Australian States, through their title registers, do not guarantee the boundaries of a parcel of land as depicted on the plan attached to certificates of title. The argument presented here is that with the development and integration of a fully digital cadastre, and the role of the surveying profession in the development and implementation of Cadastre 2034, the time is appropriate to begin the legal steps to extend indefeasibility to the boundaries of land. This article seeks to begin the discussion that could see land law move hand-in-hand with Cadastre 2034 to establish, by that year, a legally coordinated cadastre, with indefeasibility extending to the granting of boundaries. The possibilities and advantages of linking the land administration records with a digital cadastral map are too significant to dismiss as either unnecessary, too expensive, or unneeded.*

## INTRODUCTION

Land Surveying is not an exact science like mathematics and where there is a discrepancy the actual boundaries of the allotment sold, prevail over measurements and bearing shown in the grant, the map or plan being intended merely as a picture of what is found on the ground.<sup>1</sup>

Boundary disputes are a particularly painful form of litigation. Feelings run high and disproportionate amounts of money are spent. Claims to small and valueless pieces of land are pressed with the zeal of Fortinbras' army. It is therefore important that the law on boundaries should be as clear as possible.<sup>2</sup>

The Torrens system of land registration guarantees, through the prism of indefeasibility, the estate or interest as noted on the applicable State register of land holdings. But what the Torrens system does not do is guarantee the physical boundaries of the specific lot. This is what the spatial cadastre does. Through fixed boundaries (such as survey measurements) and general boundaries (such as physical features within the land) the corners of a particular parcel of land are mapped with precision, with any dispute between surveyors ultimately resolved by the courts. The spatial cadastre then relates to the textual component, with the latter represented by the Torrens register. Even in those countries where a cadastre has not been developed, land boundaries act in a similar way to the fences of suburban Australia. Reflecting the social relationship between the people in possession of those lands,<sup>3</sup> land

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<sup>1</sup> *National Trustees Executors & Agency Co of A'Asia Ltd v Hasset* (1907) VLR 404, 412.

<sup>2</sup> *Alan Wibberley Building Ltd v Insley* (1999) 78 P & CR 327, 328 (this case involved two neighbours warring for 11 years over a hedge). The reference to Fortinbras' army is a reference to Hamlet, Act IV, Sc IV, where Hamlet meets Captain Fortinbras who is moving to retake a worthless piece of Poland: "We go to gain a little patch of ground/ That hath in it no profit but the name./ To pay five ducats, five, I would not farm it".

<sup>3</sup> See the comments by Rohan Bennett, Paul van der Molen and Jaap A Zevenbergen, "Fitted, Green and Volunteered: Legal and Survey Complexities of Future Boundary Systems" (2012) 66(3) *Geomatica* 181, 181.



boundaries<sup>4</sup> exist to set parameters around the use of land, the extent of one's rights in that parcel and as a means to define and set limits around territorial disputes. What this article seeks to do is to begin a discussion as to how the legal and surveying profession can work together to develop a legally coordinated cadastre; ie one combining spatial and textual components, with indefeasibility extending to both. This goal, long-term in its vision, would work with the International Government Committee on Surveying and Mapping and its flagship document, *Cadastre 2034*,<sup>5</sup> to establish a cadastral system that would enable people to easily identify the extent of their rights, obligations and restrictions in relation to land. It would provide an integration of the legal and spatial interests and deliver a "digital representation [of land] that is survey accurate, 3-dimensional and dynamic".<sup>6</sup>

The importance of boundary identification, however, is nothing new. The first common law method of conveyancing<sup>7</sup> involved what was known as "livery of seisin" where the vendor and purchaser would meet on the actual location, with abutting neighbours as witnesses. In this era before writing, the verbal acknowledgement was stated, in a clear and firm voice, as to what was being sold, with the boundaries identified and located by expert witnesses. This was variously known as "beating the bounds", "hunting the borough" or "perambulation". As the parties walked across the land, and to ensure that the boundaries were memorised, adults would somehow mark the spot, often by the act of holding a child on the spot and hitting the child's head onto the specific location, or by lesser traumatic events such as hitting the spot with sticks.<sup>8</sup> When writing became the norm, these acts were recorded in the parish books of the local church, which often imposed legal, religious and spiritual weight upon the transaction. Once writing became the norm, and centralised authority more accepted, logic and reason dictated that the perambulations of the past would be removed in favour of legal recognition and use of the metes (this referring to distance and direction) and bounds (this referring to the fixed points which anchor the measurements with this, including objects as diverse as rocks, rivers, trees, or some artificial object)<sup>9</sup> as the way in which the boundaries of land could be identified. It was this description of the land, and the enactment of the *Statute of Uses* in the 16th century in the United Kingdom (allowing conveyance by deed) that allowed the transfer and identification of land to occur without any necessity to walk or be present physically on the location of the land. The deed would provide the metes and bounds of the land, and today, some 500 years later, it could be said that little has advanced with the plan of the land attached to the title often describing the land by way of distance, but precise determination of corner boundaries and distances between those boundaries still to be determined by the hierarchy of evidence<sup>10</sup> used by the surveying profession, with this

<sup>4</sup> The definition of a "land boundary" is the "three-dimensional space, its position identified by natural or imaginary points located by reference to the earth's crust": Peter Butt, *Land Law* (LawBook Co, 6th ed, Sydney, 2010) [202]. See also Callinan J in *Risk v Northern Territory* (2002) 210 CLR 392; [2002] HCA 23, [119].

<sup>5</sup> Intergovernmental Committee on Surveying and Mapping, *Cadastre 2034: Powering Land & Real Property* <<http://www.icsm.gov.au/cadastral/Cadastre2034.pdf>> (Cadastre 2034).

<sup>6</sup> Cadastre 2034, n 5, 6.

<sup>7</sup> For a discussion of the history of conveyancing, see Allegra Bonaventura, "Beating the Bounds: Property and Perambulation in Early New England" (2007) 19 *Yale JL and Human* 19.

<sup>8</sup> As noted by Bonaventura, n 7, 117: "Beating the bounds was a customary Old English 'performance', understood here as an enacting of events that 1) evokes the senses and 2) serves to validate that event, especially in law. These perambulations were annual Rogation rites (occurring on the three days preceding Ascension Thursday in the Christian liturgical calendar) at which the inhabitants of an English parish gathered to walk, mark and verify its bounds. As the processional party passed through the landscape, men struck bounds, markers and sometimes children with sticks, stones, or other gear. When the bounders reached significant points along the way, adults might lift a child upside down, memorably touching the spot with the child's head. The rite of perambulation had legal effect, record of which priests wrote into parish books at a time when church courts had jurisdiction over property and probate matters. Originally, it also carried both religious meaning and spiritual power."

<sup>9</sup> See LexisNexis, *Halsbury's Laws of Australia* (2 December 2013), Title 355 Real Property, "Boundaries, Fences and Encroachments" [355-13910].

<sup>10</sup> This clause is designed to support the hierarchy of evidence as follows: 1. natural features; 2. original crown marking of grant boundaries; 3. monuments; 4. original undisturbed marking of private surveys; 5. occupations; 6. measurements. The relative importance of each matter is subject to other evidence to the contrary. NSW Government, Surveyor General's Directions No 7, *Surveying Regulation Application*, cl 19.

information placed before a legal decision-maker with authority to resolve competing disputes. The accuracy and importance of this cannot be understated, the value of a registry dependent on the asset in the seen world corresponding to its description in the spatial and textual components of the cadastre.<sup>11</sup>

While we still rely largely on distances and objects as the core for describing the boundaries of land, what is less understood is the connection between surveying and the Torrens system of land registration. It is suggested that the land administration system, working in harmony with the surveying industry, could achieve the guarantee of land boundaries under the umbrella of indefeasibility. As pointed out by the previously mentioned Intergovernmental Committee on Surveying and Mapping: “The cadastral systems of Australia underpin stable and reliable registration of land based property rights. They serve as the foundation for effective land tenure transactions and in securing the legal status of property boundaries”.<sup>12</sup> To ensure that this aspiration can work, and given that political and economic drivers demand the digitisation of our world (a matter to which the surveying industry is not immune and has embraced),<sup>13</sup> the legal concept of indefeasibility must be amended to incorporate the guarantee of the boundaries as represented by the title plans. This must, however, be accompanied by a simple, inexpensive mechanism that would allow minor encroachments to be resolved by an adjudicator with designated statutory powers.<sup>14</sup> Described judicially, where it exists, as remedial legislation,<sup>15</sup> this type of enactment overcomes the problems of the common law where the primary rules are that the offending encroachment should be removed, or an order for possession provided to the landowner on which the building encroaches.<sup>16</sup> Encroachment legislation provides for a remedial smorgasboard, with options including: the payment of compensation; the conveyance, transfer, or lease to the encroaching owner of an estate or interest in the encroached land; or the removal of the encroachment. In determining which remedy to apply, the court will have regard to the extent of the encroachment, the effect the encroachment has on the value of the land, the interference that the encroachment causes, the cost of removal and the damage such removal would cause.<sup>17</sup> Knowledge of the encroaching owner will also be relevant.<sup>18</sup>

With Australian Torrens legislation currently allowing adverse possession claims to override the registered title, with the registered owner unable to access the compensation provisions of the assurance fund,<sup>19</sup> and misdescription of boundaries an exception to indefeasibility,<sup>20</sup> a new process and regime is required to ensure that, as far as possible, the *de jure*, or true boundaries, accord with what is currently happening on the land, or what could be described as the de-facto possessory

<sup>11</sup> Abraham Bell and Gideon Parchomovsky, “Of Property and Information” (2016) 116 *Colum L Rev* 237, 244.

<sup>12</sup> Cadastre 2034, n 5.

<sup>13</sup> Simon Chester, “Creating an Authoritative Virtual World”, *Spatial Source* online, August/September 2014, 28-29 <[www.spatialsource.com.au](http://www.spatialsource.com.au)> explains the concept of a new legal framework whereby a virtual world will mirror the physical world, and allow the trading in the digital rights associated with land. The digital database would be a single authorised database for all property related activities. “In time, when we buy and sell property, we will hand over the digital key to our virtual property alongside the physical key to the property” (29). See also the website of the Virtual Australia and New Zealand Initiative, <[www.vanzi.com.au](http://www.vanzi.com.au)>.

<sup>14</sup> Encroachment legislation is currently existing in the Northern Territory (*Encroachment of Buildings Act 1982* (NT)); New South Wales (*Encroachment of Buildings Act 1922* (NSW)); Queensland (*Property Law Act 1974* (Qld)); South Australia (*Encroachments Act 1944* (SA)); and Western Australia (*Property Law Act 1969* (WA)).

<sup>15</sup> *Clarke v Wilkie* (1977) 17 SASR 134, 139; *Bunney v South Australia* (2000) 77 SASR 319; [2000] SASC 141, [29]; *Steven M Clark No 3 Pty Ltd v Noack* (2004) SASC 249, [30].

<sup>16</sup> *Break Fast Investments Pty Ltd v PCH Melbourne Pty Ltd* (2007) 20 VR 311; [2007] VSCA 311. *LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd* (1989) 24 NSWLR 490. In extreme circumstances it is possible that a building built entirely on the wrong block will belong to the owner of the land on which the building is constructed, rather than the person building the house: *Brand v Chris Building Co Pty Ltd* [1957] VR 625.

<sup>17</sup> *Encroachment of Buildings Act 1982* (NT) s 6; *Encroachment of Buildings Act 1922* (NSW) s 3; *Property Law Act 1974* (Qld) s 185; *Encroachments Act 1944* (SA) s 4; and *Property Law Act 1969* (WA) s 123 (relief granted where just and equitable).

<sup>18</sup> *Pesic v South Sydney Municipal Council* [1978] 1 NSWLR 135, 142.

<sup>19</sup> MM Park and IP Williamson, “The Need to Provide for Boundary Adjustments in a Registered Title Land System” (2003) 48 *Australian Surveyor* 50, 51.

boundaries. To achieve this, the cadastre and the land administration system must unite as one to form, in what is described in this article as the legally coordinated cadastre, with the support and need for this highlighted by the considerable wealth that land adds to the collective riches of Australia. Torrens jurisdictions can only benefit from an enhanced alignment between the asset (ie the land) and the information pertaining to that land (such as the interests relevant to that land and the boundaries of the parcel).<sup>21</sup>

Importantly, this move would also respond to contemporary macro inputs, such as the need for the cadastre to provide real-time information that relates to emergency management in times of natural disasters. It would also allow us to use the technological drivers that we currently have, such as the capacity of wireless sensor networks to enable the onsite linking of property boundary information with land administration networks, as well as advancing the use of the cadastre in the financing of security interests.<sup>22</sup> The ultimate aim is for the division between maps and registers to be abolished, enabling a new integrated role for conveyancers and surveyors.<sup>23</sup>

## THE IMPORTANCE OF LAND

There is no doubting the importance of land to the Australian psyche. In a nation with total assets approximating \$12.5 trillion in 2014, land is far and away the asset class with the highest value, comprising 34% of the value of our national assets.<sup>24</sup> The next most significant asset class, and for many purposes these would not be differentiated from the title to land itself (offices, factories and other infrastructure) comprises some 18%, with dwellings constituting a further 15% of the balance sheet.

What is perhaps more remarkable is the extra resources the Australian households have used to purchase, from one another, the land on which these bigger and better dwellings sit. Indeed, most of the extra money that has gone into residential property has not gone into the physical stock of housing, but rather into land. So our fascination with housing is really, mostly, a fascination with land.<sup>25</sup>

This interest in land, however, is neither an Australian phenomenon nor particularly new. History informs us of the challenges of the Greek and Roman<sup>26</sup> empires in controlling the land which they possessed, to the current modern-day disputes concerning land. The exclusion of others from that land and the right to the resources of that land is central to the relationship that one person, one state, one group has with terra firma. Even more fundamentally, the relationship that humans have with each other involves a right to control land and space. Land has become central to government thinking, is critical to the policy machinations of major political parties, and is a lever by which stability in the central economy can be achieved. More prosaically, however, suburban boundary disputes can be

<sup>20</sup> *Land Titles Act 1925 (ACT)* s 58(1)(c); *Real Property Act 1900 (NSW)* s 42(1)(c); *Land Title Act 2000 (NT)* s 189(1)(f); *Land Title Act 1994 (Qld)* s 185(1)(g); *Real Property Act 1886 (SA)* s 69(c); *Land Titles Act 1980 (Tas)* s 40(3)(f); *Transfer of Land Act 1958 (Vic)* s 42(1)(b); *Transfer of Land Act 1893 (WA)* s 68(1).

<sup>21</sup> As noted by Bell and Parchomovsky, n 11, 276: "The Torrens System is even more valuable when combined with a common reform that has generally accompanied Torrens registration systems ... land parcels are commonly circumscribed in one of two systems. In the metes-and-bounds system, land parcels can be irregular in shape, and they are circumscribed by features of the land and measures described in a deed or other document. The rectangular system, by contrast, describes land by coordinates on a common map ... because Torrens systems and rectangular systems often go together, Torrens jurisdictions often frequently benefit from both advantageous asset configurations and from the tight alignment between asset and information".

<sup>22</sup> See the comments by Rohan Bennett, Abbass Rajabifard et al, "Cadastral Futures: Building A New Vision for the Nature and Role of Cadastres" (Paper presented to the FIG Congress 2010, Sydney, 11-16 April 2010) 6-7, copy held with the author.

<sup>23</sup> See Daniel Steudler (ed), *Cadastre 2014 and Beyond* (FIG Publication No 61) Figures 1 and 3, <<https://www.fig.net/resources/publications/figpub/pub61/Figpub61.pdf>>.

<sup>24</sup> Reserve Bank of Australia, "National Wealth, Land Values and Monetary Policy" (Address by Philip Lowe, Deputy Governor Reserve Bank of Australia to the 54th Shann Memorial Lecture, 12 August 2015) 1, 3.

<sup>25</sup> Reserve Bank of Australia, n 24, 7. At the end of 2014, Australians owed some \$1.4 trillion in housing loans, against value of property that amounted to \$5.2 trillion. Cadastre 2034, n 5, 9.

<sup>26</sup> In 173BC, Lucius Postumius Albinus, a senior figure within the Roman Empire, was required to be sent to southern Italy to resolve a dispute between the state and private citizens who were expanding their land into the public space: <[https://en.wikipedia.org/wiki/Lucius\\_Postumius\\_Albinus\\_\(consul\\_173\\_BC\)](https://en.wikipedia.org/wiki/Lucius_Postumius_Albinus_(consul_173_BC))>.

costly and stressful. An illustration of this is the litigation between *Wibberley and Insley* where an 11-year protracted boundary dispute over a strip of land some 87ft by 6ft and worth a few hundred pounds saw 11 judges hearing the matter, some £500,000 in costs incurred and the loss by the ultimately successful plaintiff of his computer business and his life savings.<sup>27</sup> If we are unable to identify who owns what, the chilling effect on the investment economy, productivity, and economic growth is significant.<sup>28</sup>

In answering this question, as to who owns what, history informs us that, originally, possession (the state of affairs speaking to what can be seen on the land) was critical, but as our appreciation of land evolved financially, emotionally and culturally, the land administration systems in all Western jurisdictions became increasingly formalised. In Australia, this was most evident with the adoption of the Torrens system of land registration, the mechanical process whereby the registration of a dealing to a public database was not merely evidence of ownership, but the creation of ownership. Evolving from this to the constituent elements of an integrated legally coordinated cadastre would allow us:

1. to know for certain who the owner of the land is (traditionally, the domain of the textual component of the register situated at the Land Titles Office);
2. to understand the extent of that ownership right (with this information gleaned from the Registrar as interpreted by the common law);
3. to identify who controls the right to deal with the land; most commonly this will be the mortgagee, (sometimes not clear from the textual component, but an aspect of increasing importance);<sup>29</sup>
4. to understand the limitations public law brings to land ownership (such as heritage restrictions, the identification of land as bushfire or flood prone, planning and subdivision concerns, or conservation covenants); and, finally, and most critically for this article
5. to identify the boundaries of the land so that it is clearly and specifically possible to articulate the physical portions to which that parcel relates (the spatial component presently within the realm of the surveying profession).<sup>30</sup>

Property is defined and illustrated by its shape, its texture and its context. Land should, because of its relative fixed location within the crust of the Earth, be easily and conclusively bound by its own parameters.<sup>31</sup> While it unnecessary to present a summary of the law surrounding boundary disputes in this article, others having already articulated this,<sup>32</sup> it is suggested that it is entirely possible, as other jurisdictions have done, to guarantee boundaries within the concept of indefeasibility and by so doing connect the spatial component of the cadastre to the land title system. If this is achieved, Australia will

<sup>27</sup> *Alan Wibberley Building Ltd v Insley* (1999) 78 P & CR 327; see Clare Dyer, “Lord’s Ruling Ends 11-year Hedge Row” <<http://www.theguardian.com/uk/1999/apr/30/claredyer>>.

<sup>28</sup> This is evidenced by what is occurring in Greece where the weakness of land titles and the cadastral system in that country has been directly linked to the difficulties that that nation faces in achieving its economic recovery: Suzanne Daley, “Who Owns this Land? In Greece, Who Knows”, *The New York Times*, 26 May 2013.

<sup>29</sup> See, eg the Registrar-General’s directions in New South Wales: <[http://rgdirections.lpi.nsw.gov.au/e-dealings/control\\_right\\_deal](http://rgdirections.lpi.nsw.gov.au/e-dealings/control_right_deal)>. Control of the right to deal will often be shown by possession of the certificate of title, or possession of the e-certificate of title.

<sup>30</sup> See generally Fernando P Mendez Gonzalez, “Property Rights, Boundaries and Legal Transactions: Musings on the Land Registry and Some of the Challenges it Faces” (1 January 2015), 4 <<http://www.elra.eu/author/fpmendez>>.

<sup>31</sup> Though it is recognised that the doctrine of accretion (*Southern Centre of Theosophy Inc v South Australia* [1982] AC 706; [1982] 2 WLR 544; [1982] 1 All ER 283; *Sunlea Investments Pty Ltd v New South Wales* (1995) 7 BPR 14,598) and the doctrine of diluvion (*Re Hull & Selby Railway Co* (1839) 151 ER 139; 5 M & W 327) can alter those boundaries from time to time. It should also be noted that a fixed location is relative to its neighbours. Australia, for example, is moving some 70mm each year to the north-east. As to how this might be reflected in a dynamic spatial datum is difficult to say at this stage. With the movement of the earth’s crust, the combining of the digital datum with an acknowledgement that a current position can only be located by a shared representation with the boundaries and distances of the plotted land may be the spatial solution needed. For a discussion as to how the continent of Australia is moving, see <[http://www.ga.gov.au/webtemp/image\\_cache/GA10407.pdf](http://www.ga.gov.au/webtemp/image_cache/GA10407.pdf)>.

<sup>32</sup> For a summary of the law regarding land boundaries, see LexisNexis, *Halsbury’s Laws of Australia* (2 December 2013) Title 355 Real Property, “Land Boundaries” [355-14033]; Lawbook Co, *The Laws of Australia* (1 March 2013) Title 28 Real Property, Ch 15 Physical Limits to Land [28.15.1070]-[28.15.1140].

remove an impediment that can hinder economic investment and promote community and civil discord between neighbours. Today, the surveying industry will often rely on physical monuments, aerial photos, survey pegs (often removed or displaced), and adjacent lands to identify the boundaries when digital data through the geodetic system can precisely identify the corners that make up the parcel of land to which Torrens provides a connecting title. At the present time, however, we are constrained in the way noted in *Comserv (No 1877) Pty Ltd v Figtree Gardens Caravan Park*:

Identifying the land described and accepting the indefeasibility of title to that land are quite different things. The Certificate of Title certifies title and does not certify that the land has all the dimensions and characteristics attributed to it in the Deposited Plan. As with other documents which are human productions, it must be recognised and accepted that there may be inaccuracies and misdescriptions, which may appear either wholly from an attempt to resolve among themselves the statements in the plan or from an attempt to apply the plan to the facts found on the ground. Where inconsistencies appear it is necessary to press on and to make a finding on the probabilities about what land was the subject of description (even imperfect description) in the Deposited Plan when it was written ...<sup>33</sup>

### THE CURRENT STATE OF INDEFEASIBILITY AND THE GUARANTEE OF BOUNDARIES

State legislation in Australia is not, as is disappointingly common in the federation, uniform when it comes to the relationship between indefeasibility and the boundaries of land; though it must be said that there does seem to be some consistency in the outcome, though not in the process to get there. To summarise, indefeasibility is not granted where any portion of land by a wrong description has been included in the title of the land.<sup>34</sup> Apart from the jurisdictions of Tasmania, Queensland and the Northern Territory, the legislation then provides an exception for the purchaser for valuable consideration who does gain indefeasibility.<sup>35</sup> Undoubtedly included to deal with surveying errors (though not exclusively),<sup>36</sup> or errors in the conversion of general law land to Torrens title (again not solely),<sup>37</sup> the misdescription exception to indefeasibility relates to the scenario where there is misdescription of land over which title is claimed,<sup>38</sup> rather than a scenario where there is a correct description of land where title has been issued with the applicant suggesting that this does not correspond to what is owned. In the former, indefeasibility will not extend to the land held by the owner, though it will extend to a bona fide purchaser in the majority of jurisdictions. In the latter, the matter will be dealt with under the prior certificate of title exception to indefeasibility, such that if the titles are considered competing, the first title issued will prevail.<sup>39</sup>

Thus, while it may be said that purchasers of value (at least in most States) do get a title from which they cannot be ejected even though the boundaries are in error, this provision has no application to bequests, or to volunteers, or to situations where the boundary dispute is minimal and an action in ejectment would not lie. Despite the limited operational sphere of the misdescription exception to

<sup>33</sup> *Comserv (No 1877) Pty Ltd v Figtree Gardens Caravan Park* (1999) 102 LGERA 74, [30].

<sup>34</sup> *Land Titles Act 1925* (ACT) s 58(1)(c); *Real Property Act 1900* (NSW) s 42(1)(c); *Land Title Act 2000* (NT) s 189(1)(f); *Land Title Act 1994* (Qld) s 185(1)(g); *Real Property Act 1886* (SA) s 69(c); *Land Titles Act 1980* (Tas) s 40(3)(f); *Transfer of Land Act 1958* (Vic) s 42(1)(b); *Transfer of Land Act 1893* (WA) s 68(1). There is a specific statutory exception for the purchaser for value in: South Australia (*Real Property Act 1886* (SA) s 69(c)); Victoria (*Transfer of Land Act 1958* (Vic) s 42(1)(b)); New South Wales (*Real Property Act 1900* (NSW) s 42(1)(c)); the Australian Capital Territory (*Land Titles Act 1925* (ACT) s 58(1)(c)); and Western Australia (*Transfer of Land Act 1893* (WA) s 68(2)(b)(ii)).

<sup>35</sup> The ejectment provision in Tasmania (*Land Titles Act 1980* (Tas) s 149) provides that a person cannot be ejected from land where they are a bona fide purchaser of land and there has been a misdescription of the boundaries. Indirectly, Queensland may also achieve the same outcome: see *Beames v Leader* [2000] 1 Qd R 347; [1998] QCA 368. It is unclear what the position in the Northern Territory would be.

<sup>36</sup> For example, it was the solicitor in error in *Pleasance v Allen* (1889) 15 VLR 601, 602.

<sup>37</sup> See *Michael v Onisiforou* (1977) 1 BPR 9356.

<sup>38</sup> *Marsden v McAlister* (1887) 8 LR (NSW) 300.

<sup>39</sup> *Land Titles Act 1925* (ACT) s 58(1)(a); *Real Property Act 1900* (NSW) s 42(1)(a); *Land Title Act 2000* (NT) s 189(1)(d); *Land Title Act 1994* (Qld) s 185(1)(e); *Real Property Act 1886* (SA) s 69(e); *Land Titles Act 1980* (Tas) s 40(3)(b); *Transfer of Land Act 1958* (Vic) s 42(1)(a); *Transfer of Land Act 1893* (WA) s 68(1). For a discussion of the operation of the exceptions relating to misdescription and to prior certificate of title, see Penny Carruthers and Natalie Skead, "The Prior Certificate of Title and Wrong Description of Land Exceptions to Indefeasibility: Resolving the Overlap" (2009) 17 APLJ 241.



indefeasibility suggesting that the extension of indefeasibility to boundaries may be unnecessary, the view of the legal profession in Tasmania that, potentially, as many as one in 20 boundaries are incorrect,<sup>40</sup> and the recent South Australian decision of *Skalkos v Gebbski*,<sup>41</sup> all serve to highlight the continuing resonance of this issue. In *Skalkos*, neighbours were in dispute about the boundaries of land, and three surveyors employed produced different results flowing from the methodology used by each surveyor (one had relied primarily on previous surveys that had been lodged with the land titles office, the others primarily relied on evidence of occupation). In considering the evidence presented, Anderson J decided in favour of reliance on the certified survey that had been provided to the registry office, and which had been relied upon by the Registrar. In that instance, possession and identification surveys were not to override the existing registered surveys and the survey marks.<sup>42</sup>

Today we can address the problems noted by Moore, who said:

Many Certificates of Title are not based on survey, and errors in survey and differences in standard of chainage mean that any attempt to treat measurements in Certificates of Title as being invariably of paramount importance in fixing boundaries must lead to wrong decisions.<sup>43</sup>

## THE MARRIAGE OF THE SPATIAL CADASTRE WITH THE TEXTUAL CADASTRE

The availability today of geodetic data,<sup>44</sup> collocated with a mature and well-understood legislative regime maintained by knowledgeable and experienced staff, enables us to consider a marriage of the two elements of the cadastral system. This would see indefeasibility extending to the boundaries of land, thus reducing inefficiencies demonstrated through legally contested boundary disputes.<sup>45</sup> We can finally combine the textual component, ie the land administration system which identifies the land property parcels, and the rights, restrictions, encumbrances), with the spatial component, represented by the cadastral maps identifying parcels of land identified through fixed and general boundaries.<sup>46</sup> What this linkage can achieve is to connect the physical to the legal, the soil to the tenurial interests, the land to the legal estate,<sup>47</sup> and to establish a unified legally coordinated cadastre where the boundaries of land are determined by some digital datum that might<sup>48</sup> encompass a shared representation between absolute coordinates as well as metes and bounds and linked to the registered estates and interests noted on the current textual title. Large-scale resurveys of boundary points have

<sup>40</sup> Law Reform Commissioner of Tasmania, *Report on Adverse Possession and Other Possessory Claims to Land*, Report No 73 (1995) 22: "As many as 1 in 20 suburban properties [have] problems with boundaries [and] the ability to regularise these problems ... is an essential part of practical conveyancing in Tasmania".

<sup>41</sup> *Skalkos v Gebbski* [2011] SASC 213.

<sup>42</sup> *Skalkos v Gebbski* [2011] SASC 213, [82], [102].

<sup>43</sup> John E Moore, "Land by the Water" (1968) 41 ALJ 532, 533.

<sup>44</sup> Geocentric Datum of Australia is the datum for horizontal coordinates or position in Australia. It has been introduced by all State and Commonwealth authorities. It is linked with the global satellite navigation systems. See <<http://www.ga.gov.au/scientific-topics/positioning-navigation/geodesy/geodetic-datums/gda>> for a discussion of this.

<sup>45</sup> It should be noted that surveyors do a lot more than simply determine boundaries. For this reason, some purchasers may still require surveys when buying land. For example, surveyors will also consider underground and aboveground easements and the location of boundary setbacks. The advantage of using GPS/GNSS data for the boundary identification is that consumers will be able to more easily identify for themselves whether the boundaries are correct.

<sup>46</sup> Kate Dalrymple, Ian Williamson and Jude Wallace, "Cadastral Systems within Australia" (2003) 48 *Australian Surveyor* 37, 40. It is beyond the scope of this article to consider, but given the movement of the earth's crust relative to its GPS location, consideration would need to be given as to whether the dynamic datum provided by the spatial cadastre would encompass distances and directions rather than precise coordinates, or a dynamic datum represented by absolute coordinates with distances and directions – a shared representation as such.

<sup>47</sup> As noted by Bennett, van der Molen and Zevenbergen, n 3, 190: "History shows that an exemplary tool for [the task of providing strength to artificial boundaries] is the cadastral survey, with all its legal and technical dimensions: it links the fiat to the bona-fide, the legal to the physical". See also Cadastre 2034, n 5, 17 which speaks of the need to align legislation and survey law, and linking rights, restrictions and responsibilities on the land, with all interests on land spatially depicted.

<sup>48</sup> Such a shared representation may be necessary because of the movement of the earth's crust. See n 31.

already been completed in New Zealand<sup>49</sup> and Quebec,<sup>50</sup> with work also being undertaken in South Korea.<sup>51</sup> The advantages of this cannot be underestimated and, for Australia, should not be quickly discarded. The legally coordinated cadastre is in place in Austria,<sup>52</sup> and to a degree in Singapore (though land boundaries are not guaranteed in the sense that is used here) as well as Sweden,<sup>53</sup> though it must be recognised that in many of these countries their historical evolution of the cadastre led to a substantially different culture and practice around conveyancing.<sup>54</sup>

For Australia, the failure to travel this path may well lead us to the same concerns highlighted by the British Columbian Court of Appeal decision in *Phillips v Keefe*,<sup>55</sup> where, in a dispute about a fenceline (echoing the previously mentioned dispute between Wibberley and Insley), the land was worth some Can\$40,000, damages of Can\$16,000 were awarded, and the parties spent in the vicinity of Can\$280,000 to resolve the dispute.<sup>56</sup> What occurred was that the property of Phillips was located adjacent to the property of Keefe. The original survey that supported the property boundaries was detailed in an 1893 subdivision plan. A surveyor undertook a survey in 1989 and, as was later established, he incorrectly came to the view that the fenceline of the adjoining property needed to be moved some four metres. The approach of this surveyor was to consider all the evidence, including some wooden stakes, and, after concluding that these were not original, he adopted a mathematical algorithm to find the correct fenceline. Following this, some of the neighbours in this particular street, including the Keefes, tore down the existing fence and removed trees and other plants that they believed were on their property. While the Keefes ultimately sold and moved on, Phillips sued in trespass as well as for the repair of the fence.

Surveyors subsequently appointed by the plaintiffs disagreed with the approach of the first surveyor, instead accepting that the fenceline was evidence of occupation relating back to the time of the original survey. Their view was that the original fence was constructed in line with the first monuments and could, therefore, be related back to the original survey.<sup>57</sup> This was accepted by the judge.

<sup>49</sup> For a discussion of the New Zealand digital cadastre, see: <<http://www.linz.govt.nz/data/linz-data/property-ownership-and-boundary-data/accuracy-digital-cadastre>>. As noted at <<http://www.linz.govt.nz/land>>: "Topographic data, or maps, show the physical features of land – critical information for emergency response, defence planning and land management. The 'cadastre', the official collection of land records, captures property boundaries, telling us where pieces of land start and end. Such a national record of physical features is critical in helping us understand our country and its assets, and for supporting economic development ... Together, these elements form the backbone of one of the world's most efficient and robust property rights system. It's so certain, it's even Government guaranteed." The Canterbury Earthquakes in New Zealand in 2011 also presented particular difficulties for a guaranteed systems of titles and land boundaries. Legislation is proposed to assist with this: *Canterbury Property Boundaries and Related Matters Bill 2015* (NZ).

<sup>50</sup> A description of the Quebec process and its ongoing role to ensure accuracy of the register can be seen here: <<http://mern.gouv.qc.ca/english/land/cadastre/index.jsp>>, though it is conceded that Quebec, with its origins in civil law, rather than common law, was always likely to marry the land titles to the cadastre.

<sup>51</sup> Bennett, Molen and Zevenbergen, n 3, 184.

<sup>52</sup> Kristin Andreasson, "Legal Coordinated Cadastres – Theoretical Concepts and The Case of Singapore" (Paper delivered to XXIII FIG Congress, Munich, Germany, 8-13 October 2006) 1, 2.

<sup>53</sup> Andreasson, n 52. An outline of the Swedish process can be found at <<http://www.lantmateriet.se/en/Real-Property/My-Property-/Uncertainties-regarding-real-property>>.

<sup>54</sup> For example, in Sweden a municipal officer will have a central role in determining boundaries, there is no role for private surveyors, and no rules of adverse possession. This can be contrasted with Australia where disputes between neighbours about boundaries, employing their own experts, is played out in the court system, and adverse possession, in various guises, still exists.

<sup>55</sup> *Phillips v Keefe* [2012] BCCA 123.

<sup>56</sup> Izaak de Rijcke, "Phillips v Keefe, Legal Uncertainty of a Boundary Location, or Uncertainty of Remedies for the Resolution of Boundary Disputes" (2012) 66 *Geomatica* 56, 59.

<sup>57</sup> See the discussion by the trial judge Dickson J in *Phillips v Keefe* [201] BCSC 2005, [77]-[86]. The judge applied the hierarchy taken by surveyors in determining boundaries. It was described in this way at [66]: "The boundary lines of land conveyed in a grant, should a dispute arise, is a matter for legal determination: ... The common law rule governing resolution of boundary disputes mirrors the survey profession's hierarchy of evidence. In *Nicholson v Halliday* (2005) 74 OR (3d) 81, the

As commented by Rijcke, in a reflection on this decision, and endorsed by the present author:

We now have a finding of “legal correctness” for this one boundary. But is the outcome worth the cost. Most laypersons would definitely not think so ... But laypersons keep resorting to the courts in order to adjudicate boundary disputes. The propensity to litigate over a boundary must have a benefit that is more about non-economic factors ... [As] a society we have ... reached the point of intolerance for this state of affairs. Litigation as a means of accomplishing legal certainty and correctness of a boundary location seems to be a luxury that we can no longer afford in respect of just one boundary.<sup>58</sup>

If this example informs us of anything, it is the need to think creatively to respond to the current impasse or dissonance between the land administration system and the spatial cadastre. A comity between the two would achieve innumerable benefits, not the least of which would be the elimination of claims of the nature that occurred in *Phillips v Keefe* and *Alan Wibberley Building Ltd v Insley*. Scenarios such as these cannot be allowed to fester, if only because the legal costs and fracturing of civil discord must outweigh the perceived reliance on principle by the parties. “Most countries in the world are committed to the development of land registration and boundary demarcation systems that do not tolerate inefficiencies and costs of the kind dealt within in *Phillips v Keefe*”.<sup>59</sup> And while few would disagree with these sentiments the question that remains is what are the elements that will lead to the solution demanded by the economic interests at stake in boundary disputes, the community expectation of access to justice, and the need for an accurate, durable and reliable land administration system. Most lay people would find it unusual that the current land administration system grants indefeasibility to the interests or estates that pertain to land, but it does not provide any assurance as to the physical boundaries of that land. The next section examines the necessary elements to allow this legally coordinated cadastre to evolve.

## THE NECESSARY ELEMENTS TO CADASTRE 2034

First, we must recognise the limitations inherent from the nature of the Australia cadastral system. Born out of the mapping of individual parcels for individual owners, with this generally connected to requirements of the land administration system and the issuance of certificates of title, it does not derive “from a complete cadastral record of all land parcels as shown on a cadastral map having its genesis in a land taxation system, which is the case with most European systems”.<sup>60</sup>

Second, land administration systems such as title by registration systems in Australia are currently suffering from the serious weakness of not being linked to cartographic technology. To link a land administration system with a digital cadastre would overcome that deficiency and would, as described by Gonazales “[act] as a saviour to compensate the Registry’s shortcomings in this field”.<sup>61</sup> Given federation is axiomatic within Australian life, it is only through actions of the state that the uncertainty around legal boundaries can be overcome.<sup>62</sup>

Third, what this ideal cadastre/land administration system would provide<sup>63</sup> is the following:

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Ontario Court of Appeal confirmed the applicable legal principles. The evidentiary hierarchy, to be applied sequentially, is: i) natural boundaries; ii) original monuments; iii) fences or possession that can reasonably be related back to the time of the original survey monuments; and iv) measurements (as shown on the plan or as stated in the metes and bounds description”).

<sup>58</sup> Rijcke, n 56, 59.

<sup>59</sup> Rijcke, n 56, 60.

<sup>60</sup> Melkamu B Moges, “Sharing the Principles: Founding the Australian Cadastral System on Robust Legislative Framework” (2014) 23 APLJ Lexis 11, 60 (online version), quoting from Ian Williamson, “The Australian Cadastral System” (Paper presented at Cadastral Reform Seminar, Seoul, Korea, July 1994) 4.

<sup>61</sup> Gonzalez, n 30, 2.

<sup>62</sup> Gonzalez, n 30, 2.

<sup>63</sup> See similar comments by Carlton A Brown, “The Millimeter Legal Coordinated Cadastre” (PhD thesis, The University of Maine, May 2011) 2 (copy held with author). He describes the elements mentioned in the present article as forming the basis of the “ultimate” cadastre – which term is used in the title of this article. See also Sharon Christensen, Bill Duncan and Pamela O’Connor, “Regulating for Sustainability: Property Issues”, 22 <[http://eprints.qut.edu.au/41637/1/1193-QUT\\_SustainPropertyW.pdf](http://eprints.qut.edu.au/41637/1/1193-QUT_SustainPropertyW.pdf)>, where the authors speak of how a limited range of property interests can lower the transaction costs of market exchange and how new kinds of property rights can create uncertainty where they are not specified with precision.



- It would provide information as to the major estates and interests owned by whom regarding what (ie it would connect the fee simple owner/mortgagee/easements/covenants/leasehold interests with the parcel of land).
- It would describe the parcel of land and provide accurate and precise boundary detail using the most current technology which presently is geodetic data.
- For those existing parcels where minor intrusion occurs, uniform encroachment legislation<sup>64</sup> would operate Australia wide.
- The continued relevance and presence of possessory based doctrines,<sup>65</sup> such as adverse possession and possessory easements, will need to be questioned, and while beyond a full discussion in this article, their continuing applicability could ultimately be corrected by allowing for a suitable period for the register to be amended to reflect the current possessory based interests, after which assertion of these interests will no longer be possible.

If the land administration system were to achieve this, and in promoting this the present author is cognisant that Cadastre 2034 is a long-term goal and that these legal changes would operate along a similar timeframe and in conjunction with Cadastre 2034, then title by registration would achieve the provision of relevant and needed information concerning the purchase of land.

[Title by registration] systems create incentives for owners to enter title information onto the register, give publicity to the registered information, validate the content of the register and suppress the relevance of much unregistered material in favour of the purchaser. The intended result is that market transacting should be stimulated by the lure held out to the prospective purchaser: an otherwise defective title becomes good when the purchaser is entered as the new proprietor.<sup>66</sup>

But the value of this is severely diluted if the boundaries as represented by that newly minted title are incorrect. Either this requires the purchaser to undertake a certification survey of that land or purchase title insurance<sup>67</sup> to protect against the risk that the boundaries are later incorrect; remembering that the assurance funds within Torrens systems do not guarantee boundaries and will not compensate if the indicative plan attached to the title is incorrect. All of these measures add cost to the individual consumer, yet the state has the power to remedy this through the linkage of the cadastre to the land administration system. The current arrangements carry a significant and heavy cost burden for each individual purchaser. Either the purchaser takes the precautionary measures to comfort themselves that the boundaries are correct, or they run the risk of later losing part or all of their land. Land represents for many individuals the most significant purchase they will ever incur, and it presently comes with established transaction costs, the most notable being stamp duty and conveyancing fees. As *Phillips v Keefe* points out all too well, consumers are ill-equipped to emotionally respond in an objective practical way to loss of land. To this end, some will suggest that the measures suggested, as potentially radical as the introduction of the Torrens system itself, impose precautionary costs that are unnecessary in our current framework. This argument might follow that while boundary disputes may well cause significant angst and concern for individuals,<sup>68</sup> and with bona fide purchasers protected in many instances, imposing a cost on all individuals in linking the spatial data to the textual analysis of land is unnecessary and unwanted. In terms of Kaldor-Hicks,<sup>69</sup> it might be said that the costs would

<sup>64</sup> *Encroachment of Buildings Act 1982* (NT); *Encroachment of Buildings Act 1922* (NSW); *Property Law Act 1974* (Qld); *Encroachments Act 1944* (SA); and *Property Law Act 1969* (WA).

<sup>65</sup> Lynden Griggs, "Possessory Titles in a System of Title by Registration" (1999) 21 *Adelaide Law Review* 157.

<sup>66</sup> Simon Cooper, "Resolving Title Conflicts in Registered Land" (2015) 131 *LQR* 108, 108.

<sup>67</sup> As an example of a title insurance policy operating in Australia, see <[www.firsttitle.com.au](http://www.firsttitle.com.au)>.

<sup>68</sup> Consider the fallout from the Tasmanian Supreme Court decision of *Woodward v Hazell* [1994] TASSC 26 (17 March 1994). This case led to Report 73 of the Law Reform Commissioner of Tasmania (see n 40), which saw the amendment of legislation (see Pt IXB *Land Titles Act 1980* (Tas)). The amended legislation has severely curtailed, though not eliminated, the chance of an adverse possession claim or possessory easement being established in Tasmania.

<sup>69</sup> "A concept that is often cited in the economic analysis of law. A Kaldor-Hicks efficiency is said to occur when an alteration in the allocation of resources produces more benefits than costs overall. A Pareto efficiency arises when at least one person is made better off and no one is made worse off. In practice, however, it is extremely difficult to make any change without making at least one person worse off. Under the Kaldor-Hicks efficiency test, an outcome is efficient if those who are made better off

exceed the benefits, even though a small number of individuals such as Keefe would avoid a catastrophic loss. The present author's argument would be that the cost, while high initially, transforms conveyancing and land ownership in a way that will yield benefits for a millennia or longer, such as has happened in Austria where boundaries are guaranteed and a legally coordinated cadastre established.<sup>70</sup> The boundary positions, once identified by geodetic data and accompanied by indefeasibility, will yield benefits to all purchasers and to the static owner, and to the process of buying and selling land. Every person willing to buy land will transact in the security that what they are getting is what they are seeing as reflected by the diagram attached to the certificate of title. By adjusting the legal rules in the way outlined, an individual's need to survey boundaries will be eliminated (although it is recognised that there are additional reasons for a survey, such as the establishment of boundary setbacks, or the identification of below-ground or above-ground easements), and it would eliminate one of the reasons for taking out title insurance (although this admittedly has a wider coverage than just boundary issues).

The encroachment legislation will also complement this by ensuring that current impingements which only have a minimal effect on the extent of ownership of land are not used to justify expensive and unnecessary legal intervention in the affairs of neighbours.

The final factor in ensuring the integrity of this utopian cadastre would be the elimination of possessory based interests, which sit uneasily within a model of title by registration. As the digital cadastre is progressively connected to the land parcels, any possible possessory interests would be noted, and in line with current models that allow for the introduction of qualified titles,<sup>71</sup> a 20-year period would allow any contested possessory titles to be litigated and resolved before the issuance of a title that guaranteed indefeasibility to land boundaries.

## CONCLUSION

A better cadastral system is the legal coordinated cadastre in which the location of a boundary corner of a parcel of land is definitively described only by a coordinate of a national reference system and not by a physical monument set in the ground. In this case, the coordinate location of a parcel boundary corner is not just a model of the actual location; the coordinate location shown in the cadastre *is in fact the actual, definitive boundary corner location*.<sup>72</sup>

The genie is now out of the bottle with geodetic data and history informs us that technological advances are likely to continue, with or without legal frameworks. As noted, land is too valuable to the Australian economy and too important to the Australian psyche to allow the law to operate in such an expensive manner. Disputes of the type seen in *Comserv (No 1877) Pty Ltd v Figtree Gardens Caravan Park*, *Phillips v Keefe* and *Skalkos v Gebiski* cannot be allowed to occur where a practical solution is at hand. That solution involves combining the best features of the Torrens system of land registration (this being indefeasibility and the conclusive non-derivative nature of the title), with the technical accuracy and precision of modern positioning systems. If other jurisdictions, such as Austria and Quebec, can combine legal certainty with precision-based identification of the metes and bounds of contemporary land ownership to establish the legally coordinated cadastre, then there is no reason

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could *in theory* compensate those who are made worse off and so produce a Pareto efficient outcome. Although all Kaldor–Hicks efficient situations are Pareto optimal, in that no further Pareto improvements can be made, the reverse is not true. Conversely, although every Pareto improvement is a Kaldor–Hicks improvement, most Kaldor–Hicks improvements are not Pareto improvements": J Law and EA Martin, *Kaldor-Hicks Efficiency, A Dictionary of Law* (Oxford University Press, Oxford Reference, 2009), <<http://www.oxfordreference.com.ezproxy.bond.edu.au/view/10.1093/acref/9780199551248.001.0001/acref-9780199551248-e-2160&gt;>>.

<sup>70</sup> See the discussion of this in Gerhard Navratil, Jeannine Hafner and Dmitri Jilin, "Accuracy Determination for the Austrian Digital Cadastral Map", <[http://publik.tuwien.ac.at/files/PubDat\\_184753.pdf](http://publik.tuwien.ac.at/files/PubDat_184753.pdf)>. The process in Austria involves, where there is a conflict between neighbours, for all neighbours to be present on the land, at which point a chartered surveyor presents their findings as to the correct boundary. Once agreement is reached, the parties must sign a document to that effect and, from there, the boundaries are entered into the digital cadastre. A copy is lodged with the land titles office and this process has the same effect as if the matter had been resolved by a judge. See the discussion by Brown, n 63, 47–48.

<sup>71</sup> See eg s 21 of the *Land Titles Act 1980* (Tas). This provision allows for the notion of a qualified title.

<sup>72</sup> Brown, n 63, 4 (emphasis in original).

why Australia cannot follow suit. Cadastre 2034 provides a framework, an aspiration and a mission for the surveying profession. The law must quickly connect with the coat tails of Cadastre 2034 and attach itself to its progress. Australian purchasers and owners of real estate are significantly disadvantaged if this is not done, with the only winners being lawyers and surveyors engaged to provide expert counsel or witness to a boundary dispute. Australians should be discouraged from becoming Fortinbras' army.